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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 611

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE,

Petitioner,

vs.

PENNSYLVANIA WATER AND POWER COMPANY and PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PENNSYLVANIA WATER AND POWER COMPANY and PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Consolidated Gas Electric Light and Power Company of Baltimore (Consolidated), prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on January 3, 1952 (R. 250). This decision affirmed a *summary* declaratory judgment of the United States District Court for the District of Maryland entered on May 21, 1951 (R. 1-2), declaring invalid on its face, upon motion for summary judgment of respondent, Pennsylvania Water

and Power Company (Penn Water), a certain long term contract for the sale by Safe Harbor Water Power Corporation (Safe Harbor) of its entire output of hydroelectric energy at wholesale in interstate commerce to Penn Water and Consolidated, which were the creators of Safe Harbor. This contract, consisting of the original agreement of the parties dated June 1, 1931, and two supplements thereto entered into respectively on August 1, 1932, and November 22, 1939, will be referred to herein as the "Safe Harbor Agreement". It is set forth in the Record at pages 91-112.

The contract thus summarily invalidated is the identical contract, which, after lengthy hearing, was modified as to rates by the Federal Power Commission and, as modified, approved and ordered filed in its entirety as Safe Harbor's tariff governing its interstate rates and services, by the order of the Federal Power Commission dated November 4, 1946, (5 F. P. C. 221), affirmed by the Third Circuit in 179 F. 2d 179 (1949) cert. den. 339 U. S. 957. It is one of two separate contracts, the invalidation of which was alleged by Penn Water as a basis for its application to this Court for certiorari in *Pennsylvania Water and Power Co. et al. v. Federal Power Commission et al.*, a decision of the District of Columbia Circuit dated July 3, 1951, certiorari to review which was granted February 4, 1952.

Consolidated, a "public utility" under the Federal Power Act operating solely in Maryland, is the supplier of electric energy to the consuming public in the Baltimore Metropolitan Area. It is also a major participant with Penn Water and Safe Harbor, two electric generating companies with federally licensed plants in Pennsylvania on the Susquehanna River, the operations of both of which are confined to the State of Pennsylvania, in contributing to an interstate integrated power pool fully regulated by the Federal Power Commission. The Federal Power Commission has thoroughly investigated, approved and highly praised this pool (including the contractual arrangement creating and supporting it) for its efficient, economical,

carefully worked out and long tested utilization of firm steam generated energy and fluctuating hydro energy derived from the highly variable waterpower of the Susquehanna River.[1] Other beneficiaries of this interstate power pool, by virtue of which energy flows back and forth without regard to state lines in accordance with the economic and practical exigencies of the moment, include the Pennsylvania Railroad (for the operation of its electrified lines), Metropolitan Edison Company in Pennsylvania, Philadelphia Electric Company in Pennsylvania, Pennsylvania Power and Light Company in Pennsylvania, and Potomac Electric Power Company in Washington, D. C.

This power pool is founded primarily upon the extensive steam generating plants of Consolidated, the hydroelectric and steam generating plants of Penn Water, the hydroelectric plant of Safe Harbor, and the transmission lines owned by Penn Water and Penn Water's wholly owned Maryland subsidiary which interconnect the energy resources of Penn Water, Safe Harbor, Consolidated and Potomac Electric Power Company.

Safe Harbor was created by Penn Water and Consolidated as an additional long-term source of hydroelectric energy for them and for this power pool; and, by the Safe Harbor Agreement, Penn Water and Consolidated supplied Safe Harbor's entire equity capital, guaranteed its entire funded debt, and bound themselves to receive all its output and to pay all of its operating expenses and taxes plus a regulated fair return on its plant investment. Since the execution of the Safe Harbor Agreement on June 1, 1931, Consolidated and Penn Water have been (and are

[1] This cooperative arrangement and pool are objectives of the policy of Congress expressed in the Federal Power Act (U. S. C. A. Title 16, Secs. 791-824h). Section 824a(a) of that Title places a duty on the Federal Power Commission to "promote and encourage" the "inter-connection and coordination" of electric facilities within and between regional districts.

today), as the Court of Appeals found, Safe Harbor's sole stockholders and sole customers (R. 39-47, 139-140). Though made a defendant in this action, Safe Harbor, in view of the parental relationship of Consolidated and Penn Water, filed a non-committal answer to the complaint and took no further part in the proceedings.

From the standpoints of the public interest, the Public Service Commission of Maryland's guardianship of the consumers of the Baltimore Metropolitan Area, the large utility beneficiaries of the power pool in question, the impact of the Sherman Act, the objectives of the Federal Power Act, the jurisdiction of the Federal Power Commission and the effect of its approval of the pool and of the Safe Harbor Agreement, and the jurisdiction of the Pennsylvania Public Utility Commission, this case is directly related to the conflicting cases of *Pennsylvania Water and Power Company* v. *Federal Power Commission,* and *Pennsylvania Public Utility Commission v. Federal Power Commission,* Nos. 428 and 429, in which certiorari was granted on February 4, 1952, and in which Consolidated is an Intervenor-Respondent.

OPINIONS BELOW

The opinion of the District Court (R. 3-9) is reported in 97 F. Supp. 952. The opinion of the Court of Appeals has not yet been reported but will be found at page 231 of the Record.

JURISDICTION

Jurisdiction to issue the writ of certiorari requested is conferred by U. S. C. Title 28, Secs. 1254 and 2101. The judgment and opinion of the Court of Appeals was filed January 3, 1952, and this petition is filed within the period of ninety days thereafter.

STATEMENT OF THE MATTER INVOLVED

In this summary judgment proceeding, the record facts herein set forth *must be taken as true,* because on the face of the pleadings and affidavits they are (a) undisputed or (b) to the extent disputed, alleged by petitioner. The lower Courts, however, committed the fundamental error of disregarding many of these material facts and, in violation of Rule 56 of the Federal Rules of Civil Procedure, resolving others, though disputed, against petitioner.

(a) *The Holdings of the Lower Courts*

Solely by reason of *four* separable provisions contained in Articles III(a), IV (last sentence) and XIV of the Safe Harbor Agreement (R. 95, 96-7, 105), which are set out below at pages 11-12 of this petition, and which the lower Courts patently misconstrued, the District Court held that the entire Safe Harbor Agreement was:

> (1) *per se* in violation of the Sherman Act, although none of its provisions effected price-fixing, monopoly, boycott or exclusion of competitors from a market, which are the only restraints which this Court, thus far, has held not to be subject to the factual Rule of Reason criteria;
>
> (2) in violation of a statute of Pennsylvania,[2] although the Safe Harbor Agreement did not constitute any transfer of Safe Harbor's powers, franchises or

[2] This statute is Article III, Sec. 3, of the Public Service Company Law of Pennsylvania, in force when the Safe Harbor Agreement was executed. It provided:

"Upon like approval of the commission first had and obtained, as aforesaid, and upon compliance with existing laws, and not otherwise, it shall be lawful * * *.

"(c) For any public service company to sell, assign, transfer, lease, consolidate or merge its property, powers, franchises, or privileges, or any of them, to or with any other corporation or person."

privileges within the proper meaning of that state statute, although petitioner had tendered the factual issue that the Pennsylvania Public Service Commission had approved the Safe Harbor Agreement, and although the state statute has been rendered, by Sec. 8 of the Federal Power Act (U. S. C. A. Title 16, Sec. 801), constitutionally inapplicable to Safe Harbor, a 'licensee'' and ''public utility'' under the Federal Power Act, to its interstate wholesale contract, and to any transfer of its rights and franchises as a licensee; and

(3) in violation of the common law and public policy of Pennsylvania, although the Safe Harbor Agreement must be judged exclusively in the light of paramount federal law, and in any event, did not effect surrender to others of any initiative or freedom of Safe Harbor as a public utility, or of its directors, to expand its plant (if permitted by the Federal Power Commission), to make all proper agreements with any one, or to apply to any governmental agency having jurisdiction to regulate its powers, rates or services.

These *four* provisions of the Agreement, which were the only ones found objectionable, were minor and unimportant ones, which have never, in over 20 years during which the Safe Harbor Agreement has operated, had any practical effect. Nothing has happened in over 20 years to call into operation any of these four provisions and during that period they have not influenced the production or disposition of one kwh. of electric energy. During that same period the admittedly legal features of the Agreement have independently governed the *complete* production, sale and delivery of over 16 billion kwh. of energy. The four provisions which the lower Courts held made the entire Safe Harbor Agreement illegal *per se* should have been found completely separable from the rest of the Agreement.

The Court of Appeals also reached the conclusion that the Safe Harbor Agreement was *per se* violative of the Sherman Act for an additional reason, namely, its alleged "close connection" with a separate contemporaneous agreement between Penn Water and Consolidated which related solely to the sale of certain electric energy belonging to Penn Water and Consolidated, and to which Safe Harbor was not a party. This last mentioned agreement, which is referred to as the "Penn Water Contract", had been earlier held invalid on its face by the Fourth Circuit as *per se* violative of the Sherman Act and as violative of the laws of Pennsylvania, because it contained certain provisions applicable to Penn Water's activities, which provisions do not appear in the Safe Harbor Agreement and which are completely different from Articles III(a), IV (last sentence) and XIV of the Safe Harbor Agreement. See *Pennsylvania Water & Power Co., et al. v. Consolidated Gas Electric Light and Power Co., et al.*, 184 F. 2d 552 (1950) cert. den. 340 U. S. 906, a decision which we believe to be unsound and erroneous even if limited to its particular facts, but, in any event, completely distinguishable from the present case.

The Court of Appeals attempted to connect the Safe Harbor Agreement to the separate and distinct Penn Water Contract, but failed to find any illegality in the connection between the two. It therefore merely *imputed* the illegality which it had purported to find in certain specific provisions of the Penn Water Contract to the separable Safe Harbor Agreement. It found that both agreements were the implementations of "purposes they [the parties] desired to accomplish by joint action" (R. 237), namely, an interstate power pool. But there was no finding either in the present case or in the *Penn Water* case that such underlying cooperative pooling purpose was illegal. There were no facts whatever in the Record from which such a finding could be made. On the contrary, the uncontradicted facts on this point set forth in an affidavit filed by Consolidated

were that the Safe Harbor Agreement "was not made for the purpose of stifling Safe Harbor's competition, but was made as a necessary prerequisite to the establishment, financing and construction of the Safe Harbor project and to provide an additional source of power for Penn Water and Consolidated" (R. 124, 126).[3] Thus, there is here no

[3] The absence of an illegal purpose is an important circumstance in this case for two reasons. First, it has always been recognized that, although an innocent purpose will not save from legal condemnation an agreement which, in fact, effects an unreasonable restraint, good purpose and intent are relevant and material upon the question whether a contract does bring about a restraint that is forbidden. Second, the absence of any illegal purpose in creating the pool and in separately making the Penn Water Contract and the Safe Harbor Agreement destroys the soundness of the holding that one agreement must fall simply because the other contained provisions peculiar to it which may have had an illegal effect.

The lower courts in both the *Penn Water* case and in the present case assumed the lawful intent and purpose of the parties in making both contracts, and both contracts were held illegal solely because of the effect of particular provisions which they severally contained.

Thus, the District Court in the present case expressly held the Safe Harbor Agreement invalid "irrespective of the pure intention or good faith of the parties" (R. 9; 97 F. Supp. 952 at 956); and the Court of Appeals quite properly praised the underlying cooperative purpose and intent behind the Safe Harbor Agreement that it should be an instrumentality of the interstate power pool, as follows (R. 241):

> "* * * the facts tend to show that *some cooperation* between Safe Harbor and other electric utilities is essential to its greatest economic development and success. Safe Harbor is *limited* by its Pennsylvania charter and certificate of public convenience to the *hydro* electric development and sale of electric power; and the scope of its operations is *limited* by the capacity of its power site and the flow of the river. Its output is therefore *not uniform and dependable* and it must market its product to a utility or utilities possessed of facilities for the production of steam generated electric

holding that the Safe Harbor Agreement was part of, or the means of effectuating, any underlying illegal conspiracy or combination. By the "illegal plan" of which the Court of Appeals states the Safe Harbor Agreement was a part (R. 237), the Court necessarily meant that the Safe Harbor Agreement was part of the Penn Water Contract. But such conclusion flies directly in the face of the record facts.

(b) *The Terms, Interpretation and Effect of the Safe Harbor Agreement.*

The Safe Harbor Agreement (R. 91-112), by its salient terms, provides:

1. for the necessary financing of a *wholly new* project, to be constructed and operated by Safe Harbor, a subsidiary corporation to be wholly owned jointly by Penn Water and Consolidated (Penn Water to contribute one-third of its equity capital and to own one-half of its voting stock, and Consolidated to contribute two-thirds of its

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energy which can be economically utilized with that of Safe Harbor. The aggregate loads must be large enough to absorb Safe Harbor's output in low water periods to supplement the output of steam generated energy during peaking periods of demand; and also to absorb Safe Harbor's output in high flow periods when it can be used as a substitute for steam generated energy at a reduced cost. The sale of the entire output of Safe Harbor to other members of the pool at a fair price *ensures an economic use of the available product* and a fair return on the investment, and *the resulting economies may be reflected in lower rates to consumers.* The Commission is of opinion that Safe Harbor *must become a member of such a power pool in order to utilize and to expand its facilities to its best advantage;* and that the integrated and interconnected interstate system, composed of Safe Harbor and its two customers, Penn Water and Consolidated, is such a pool; * * *.

"That the plan established by Penn Water and Consolidated is operative cannot be doubted *since the experience of twenty years shows that it is practicable and successful,* * * *". [Emphasis supplied.]

equity capital and own one-half of its voting stock and an equivalent amount of its non-voting stock);

2. for the sale until 1980 of Safe Harbor's entire output of its initial seven-generator plant (except such as might be required for the performance of any duty imposed upon Safe Harbor by its charter or otherwise by law) to its two owners equitably in the same ratio as their respective stockownerships (i. e., one-third thereof to Penn Water and two-thirds thereof to Consolidated) (Art. II);

3. for the transmission and delivery by Penn Water, over its transmission lines, to Penn Water and Consolidated of the energy respectively purchased by them from Safe Harbor (Art. VII);

4. for the payment by Penn Water and Consolidated to Safe Harbor of rates for this purchased energy, in stated dollar amounts for each of the years through 1937, and thereafter in amounts sufficient to yield Safe Harbor a net return of 7% on its investment, subject, however, to changes in such rates by orders of any governmental regulatory authorities having jurisdiction (Art. V);

5. for cooperation and coordination of the parties in the joint use of their facilities, in their investments in additional facilities and in the conduct of their several operations, in order to encourage maximum economy and efficiency in the interchange of energy (Art. IV);

6. for arbitration of any disputes which might arise between the parties to the agreement, which arbitration any one of the parties, including Safe Harbor, could freely and independently invoke (Art. XV).

None of the foregoing contractual provisions were found illegal in and of themselves by the lower Courts in the present case. On the contrary, the lower Courts characterized the respective contractual shares of Penn Water and Consolidated in Safe Harbor's output as the "rightful entitlement" of each of them.

The Agreement also contained the following minor and separable provisions set forth in Arts. III(a), IV (last sentence) and XIV thereof (R. 95, 97, 105). It was these provisions which the lower Courts in this case held to be illegal, and by reason of which summarily adjudged the entire Safe Harbor Agreement to be illegal *per se* on its face. Holtwood Company is Penn Water; Baltimore Company is Consolidated:

"ARTICLE III

"*Other Entitlements*

"(a) At the request and for the benefit of either Baltimore Company or Holtwood Company, Safe Harbor Company shall install additional machinery or equipment, not included in the initial development, subject to the stipulation in the last paragraph of Article V*, provided such request is submitted in writing to Safe Harbor Company at least eighteen months before the date when the facilities are to be completed, and that the arrangement is approved by the receiving company which is not making the request. Furthermore, Safe Harbor Company will not contract to supply power and energy (except any which may be required for the performance of any duty or obligation to serve imposed on it by its charter or otherwise by law) from additions to its plant to any party other than Baltimore Company and Holtwood Company without the written consent of both Baltimore Company and Holtwood Company.

* * * * * * * *

"ARTICLE IV

"*Co-ordination and Joint Use of Facilities*

"* * * For this purpose Safe Harbor Company will not enter into other agreements with either receiving

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* Relating to payment therefor.

company without the approval of the other, and will take into consideration either receiving company's suggestions for the best co-ordinated utilization of all facilities that may be mutually beneficial.

* * * * * * * *

"ARTICLE XIV

"Operating Committee

"Within thirty days after the execution of this agreement Baltimore Company and Holtwood Company shall each appoint one representative to act as its agent for investigation, consultation and advice in all operating, engineering and accounting matters pertaining to this agreement. Each appointment shall be evidenced by written notice to the other party signed by an executive officer. Either party at any time may change its representative or withhold or withdraw from its representative the authority to act for it in any matters specified in the notice, provided that it designate in such notice other representation in respect to such matters. These representatives, to be known as the Operating Committee, shall confer upon request of either; in case of their inability to agree, the question in dispute shall be submitted to the Presidents of the respective companies for their decision."

With regard to the first sentence of Article III(a), it is apparent that it does not restrict Safe Harbor from installing any used and useful additional machinery and equipment which it, and its directors, see fit to install. Safe Harbor has done so (R. 147-148). The provision merely *requires* Safe Harbor to *expand* its plant when both its owners and customers properly and reasonably request it to do so. It does not permit them to force Safe Harbor to install uneconomic additional machinery and equipment or such as would be detrimental to Safe Harbor. If they attempted to do so, they would thereby

commit a breach of Article IV of the Agreement, which expressly requires their cooperation for the installation of the most economical and efficient facilities. In such event, Safe Harbor could refuse to accede to their request, or exercise its independent contractual right to invoke arbitration. Furthermore, any such attempt would be frustrated by the Federal Power Commission. As a licensee under the Federal Power Act, Safe Harbor must obtain the Federal Power Commission's prior approval in order to install any additions which exceed 100 horsepower. (See U. S. C. A., Title 16, sec. 803(b).)

With regard to the second sentence of Article III(a), it must be realized, as we show below, that it has at all times been an academic provision. This is so, because, on account of physical limitations, *there never has been, and will likely never be, any output from additions* to Safe Harbor's initial seven-generator plant. Furthermore, since the amendment to this provision (hereinafter described), which was effected by the order of the Federal Power Commission dated November 4, 1946, any output which may come from hypothetical additions to Safe Harbor's plant stands on the same footing as output from its initial plant. Penn Water and Consolidated have been obligated to pay for such additional output and will be the purchasers thereof, if it can be produced. For the same reason, Safe Harbor has not been deprived of any economic incentive to install productive additions. It will be entitled to the same pecuniary return from Penn Water and Consolidated on the cost thereof as on the cost of its initial plant.

With regard to the last sentence of Article IV, it is apparent that, by its express terms, it does not prevent Safe Harbor from making all separate contractual arrangements with either Penn Water or Consolidated. This provision, to be properly judged on its face, must be read in its context in Article IV. As so read, it does not forbid all such side agreements, but only those which would work against the obligations of the parties expressed in Article

IV to cooperate for the greatest economy and efficiency. This is the meaning of the limiting words "For this purpose" with which the sentence begins and which link and confine it to the rest of Article IV.

With regard to Article XIV, it is apparent from its terms that the Operating Committee for which it provides has no powers whatever to *bind* Safe Harbor or either of the other parties. The fact that Safe Harbor is not even represented on this Operating Committee shows that Safe Harbor's decisions are not to be affected. But, more importantly, the functions and powers of the Operating Committee are expressly limited to "investigation, consultation and *advice* in all operating, engineering and accounting matters pertaining to this agreement." The Committee has never attempted to do anything else.

The record facts also show that there was no "close connection" or interdependence between the Safe Harbor Agreement and the "Penn Water Contract", which the Fourth Circuit earlier held invalid on its face solely because it contained certain provisions relating exclusively to the activities of Penn Water, which provisions do not appear in the Safe Harbor Agreement and were completely different in character and effect from any of the terms of the Safe Harbor Agreement. See *Pennsylvania Water and Power Co. v. Consolidated Gas Electric Light & Power Co.*, 184 F. 2d 552 (C. A. 4, 1950). The two contracts were contemporaneous and they were each separate and independent implementations of the lawful interstate power pool. But there their supposed "connection" ended. The Penn Water Contract had nothing to do with the activities or operations of Safe Harbor or with Safe Harbor's energy in the hands of Safe Harbor. The execution and operation of neither contract were dependent on the execution and operation of the other. Both could be, and have been, separately performed. Since the decision invalidating the Penn Water Contract, the Safe Harbor Contract has been fully and satisfactorily performed (R. 153-4).

(c) *Safe Harbor Could Not and Would Not Have Been Built Without Cooperation Between Penn Water and Consolidated and Without the Safe Harbor Agreement.*

In the late 1920's Penn Water conceived the idea of developing, by the construction of a new hydroelectric plant, the then unused and wasted water power resources of the Susequehanna River at Safe Harbor located some eight miles above Penn Water's own plant at Holtwood, Pa. Penn Water acquired certain land and flowage rights at this site, made preliminary investigations and plans for the project, and caused Safe Harbor to be incorporated as a Pennsylvania corporation[4] (R. 126-129). The economic utilization of the available water power required an investment of $30,000,000. Penn Water, acting alone, could neither finance a project of that magnitude nor provide a market for the large but unpredictably fluctuating output therefrom (R. 126-131).[5] If the Safe Harbor project was

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[4] Safe Harbor was formed on January 6, 1930, by the merger of two predecessor companies. But these predecessor companies had been incorporated by Penn Water immediately prior thereto in 1929 and had never operated or held franchises to operate. Penn Water and Consolidated *created* the wholly new business of Safe Harbor. They did not *acquire* from others a pre-existing going business, and then engross that business by turning it over to their jointly-owned subsidiary.

[5] The installed capacity of Safe Harbor's seven-generator plant is 230,000 kw., but the amount of output in kwh., dependent entirely upon the fluctuating flow of the Susquehanna River, varies widely and unpredictably as between years, season of the year, days and hours of the day. The flow of the Susquehanna varies from as much as 860,000 cu. ft. per second to as little as a seven-day average of 2,100 cu. ft. per second, a variation factor of 410 to 1. Safe Harbor, lacking any steam-generating plant and any charter or franchise rights to install such plant, can generate "around the clock" energy of less than 5% of its installed capacity. Furthermore, Safe Harbor's dam, the size of which is limited, cannot impound sufficient water to overcome

to be built, it was absolutely necessary for Penn Water and another established electric utility company, with large resources and distribution territory, to cooperate as partners or joint adventurers in the creative enterprise (R. 119, 131). Penn Water made several unsuccessful attempts to interest certain other electric utility companies in the project before approaching Consolidated for this purpose (R. 126, 128).

A long-term contract, such as the Safe Harbor Agreement, for the sale of all its hydro energy was absolutely essential to the creation of Safe Harbor (R. 131). Its widely fluctuating and unpredictable output could not be marketed directly to consumers and could not then be readily marketed even to electric utilities for resale. The bonds of Safe Harbor necessary for its financing could not have been advantageously sold without the assurance of a future market provided by a long-term contract (R. 130, 131). Consolidated could not have been induced to assume the risk entailed in the large investment it was called upon to make in such a new undertaking (R. 129, 130) and in costly installations at Baltimore in order to accommodate this hydroelectric output, without the assurance, by a long-term contract, that it would be entitled in the future to a commensurate share of Safe Harbor's output.

Upon the assurance that such a contract would be made, Consolidated advanced $9,600,000 to Safe Harbor on its

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this inconstant feature. Safe Harbor is a "run of the river" plant. Before its energy can be used by consumers, it is absolutely necessary that it be "firmed up" by steam electric generation, which Safe Harbor does not possess. Nevertheless, electric energy cannot be stored but must be marketed and used the instant it is produced. Hence, Safe Harbor's undependable output cannot be marketed directly to consumers or to any electric utility which lacks sufficient steam generation to firm it up. By its very nature, Safe Harbor's output must be sold to and utilized in an interstate power pool (R. 149-50). See also the findings on this point by the Court of Appeals quoted in footnote 3, *supra*.

unsecured notes for construction prior to financing. Consolidated provided two-thirds and Penn Water one-third of Safe Harbor's equity capital of $9,000,000, and Consolidated became the primary guarantor of all of Safe Harbor's $21,000,000 of bonds. Penn Water received one-half of Safe Harbor's voting stock. Consolidated received one-half of Safe Harbor's voting stock and an equivalent amount of Safe Harbor's non-voting stock. (R. 131-2).

Thus, without the cooperation of Penn Water and Consolidated in this creative joint adventure and without the Safe Harbor Agreement, or an agreement substantially like it, the Safe Harbor project could not, and would not, have been built (R. 131). A great natural resource would have continued going to waste.

The Safe Harbor Agreement created and called into being a *wholly new business,* which had never been in other hands or in pre-existing competition with anyone. Its whole purpose and effect was to augment and expand supply to the full potentiality of the Susquehanna River and not to curtail or suppress it (R. 124, 126, 147-8).

(d) *Safe Harbor Physically Cannot Produce Any Energy in Addition to the Output of its Seven-Generator Plant.*

The average flow of the Susquehanna River was, and is, able to provide water power sufficient to operate seven generators, each of 42,500 horsepower, *and no more.* Seven such generators will exhaust the entire flow of the Susquehanna River up to 65,000 cu. ft. per second. River flow in excess of that amount will occur on the average on only 54 days in the year, and these days will be unpredictably scattered throughout the year (R. 141, 142). Hence the plan *from the very beginning* was to construct a plant which would consist of seven, and only seven, such generators (R. 141, 142, 143, 146). Safe Harbor's powerhouse was constructed to provide space for only these seven contemplated generators (R. 146). The first six generators were

installed as the "initial development" during the years 1931—1934, but the parties, as early as 1931, committed themselves to the Pennsylvania Railroad to install the seventh and last generator, to produce 25-cycle energy, upon eighteen months' notice from the Railroad that its output would be needed for the railroad electrification (R. 161). Pursuant to this commitment, this seventh and last generator was installed in 1940.

Affidavits filed in answer to the motion for summary judgment set forth uncontradicted facts demonstrating that the generating capacity of Safe Harbor cannot feasibly or economicably be increased or expanded by any generating additions to plant.

(e) *Safe Harbor's State Charter and Franchise Powers and the Character of its Product Rendered it Unable to Compete.*

By its incorporation Safe Harbor acquired the state-conferred statutory right to generate *hydroelectric energy only* and to sell the same only to such persons and at such places as the Pennsylvania Public Service Commission should permit.[6] In Safe Harbor's application to that Commission, presented in the early part of 1930 for a Certificate of Public Convenience to begin the exercise of its charter powers, and at the hearing thereon, the Pennsylvania Commission was fully informed of the plan which Penn Water and Consolidated had formed for the Safe Harbor develop-

[6] Safe Harbor obtained charter rights limited to "the supply, storage or transportation of water and waterpower for commercial and manufacturing purposes" in two rural Pennylvania townships at the project site (R. 133, 134, 135, 150). Its powers were enlarged to those stated above, by Pennsylvania statutes of general application to such companies (Act of July 2, 1895, P. L. 425, as amended by Act of May 7, 1929, P. L. 1632). Safe Harbor never acquired charter or franchise rights to own or operate a steam-electric generating plant or to own or operate transmission lines for the delivery of its product, or to serve any distribution territory whatever (R. 133, 134, 135, 152).

ment and specifically informed: (1) that Penn Water and Consolidated would control Safe Harbor by stock ownership, (2) that they would be the exclusive customers for Safe Harbor's entire output under a long-term contract, and (3) that Penn Water would undertake to transmit and deliver to Consolidated in Maryland Consolidated's share of Safe Harbor's energy, and for that purpose would install additional transmission lines.

With this information before it, the Pennsylvania Commission approved the Safe Harbor plan and project as in the public interest, but, by the Certificate of Public Convenience which it issued on March 31, 1930, this Commission *expressly forbade Safe Harbor to sell its output to anyone except Penn Water and Consolidated* (R. 168-169). The Certificate also expressly prevented Penn Water from reselling its share of Safe Harbor's output except to certain named electric utilities. Thus, before Safe Harbor began operations and before the Safe Harbor Agreement was executed, the Pennsylvania Commission took care to prevent any competition between Safe Harbor and any other electric generating company. Since Safe Harbor was (to the extent such Pennsylvania law could validly apply) legally prevented at the beginning from selling its product to anyone except its two parent companies, without later permission of this Commission, there was no possibility at that time that Safe Harbor *itself* would or should compete with anyone, or that its product would or should compete with the product of others, until, of course, after it should come into the hands of Penn Water and Consolidated as purchasers. As stated in the opinion of the Court of Appeals "these two utilities are its only customers under an arrangement approved by the Pennsylvania Commission" (R. 234).

Safe Harbor's widely fluctuating output of unfirm hydroelectric energy (described in footnote 5, *supra*) could not physically or economically compete in any market with the "firmed up" energy of Penn Water, Consolidated or any

other electric generating utility in the vicinity of Safe Harbor (R. 149). Therefore, Safe Harbor not only had no product of the character which could compete with marketable firmed up energy, and no transmission lines (or franchise powers to own and operate transmission lines) in order to deliver it to a general market, but it was precluded from entering any competitive market, even if it could physically, practically and economically have done so, by the said order of the Pennsylvania authorities.

Notwithstanding the *contested* issues with regard to Safe Harbor's ability and obligation to compete with its creators (alleged by Penn Water, R. 14, 15; denied by Consolidated in its answer, R. 48, and affidavit, R. 124-5, 129-146, 149-152), the Court of Appeals purported to find as a fact, *in this summary judgment proceeding,* that, were it not for the Safe Harbor Agreement, "Safe Harbor would be a potential competitor" in the electric distribution business (R. 237). The Court of Appeals rested this finding wholly upon the two facts that Safe Harbor's plant is "so located as to furnish power to customers in Pennsylvania and elsewhere, and that in fact its product is delivered over the lines of Pennsylvania Water to various utilities in Pennsylvania, Maryland and the District of Columbia" (R. 237). It is submitted that these two facts do not even tend to support the conclusion of the Court of Appeals that Safe Harbor is in potential competition with anyone. And certainly there is no legal requirement under the Sherman Act for parent companies to compete with their wholly-owned subsidiary supplier, when the business of the subsidiary is *a wholly new one* which they created and did not acquire from others and which had never been in actual or potential competition with anyone before.

Inability to produce anything but a limited amount of fluctuating hydroelectric energy, inability to increase its output by any generating additions to plant over the output of its seven generators, inability to operate transmission lines, and inability to sell its product to anyone except

its parent companies were the *birthmarks* of Safe Harbor, impressed upon it, not by the Safe Harbor Agreement, but by nature and by law.

(f) *The Approval of the Safe Harbor Agreement by the Pennsylvania Commission.*

We have just recited the Pennsylvania Commission's approval, by the issuance of the Certificate of Public Convenience, of the conditions which became the salient features of the Safe Harbor Agreement when it was later executed on June 1, 1931. The Safe Harbor Agreement itself was filed by Safe Harbor with the Pennsylvania Commission as early as September 17, 1933, in compliance with a General Order of that Commission.[7] It has not been disapproved by the Pennsylvania Commission, and *an issue of fact* exists in this case as to whether it has been affirmatively approved by that agency, if that fact is legally material. Penn Water alleged that it had not been so approved (R. 26). Consolidated and the Public Service Commission of Maryland denied this allegation (R. 55, 181). Penn Water's affidavit on the point is limited to the fact that no formal "order" of the Commission approving it has been entered (R. 79). The Pennsylvania Commission itself, though a party to this case and the best source of information on this point, filed no affidavit on the subject.

(g) *The Relationship of the Federal Power Act and the Federal Power Commission to the Safe Harbor Agreement.*

On April 22, 1930, Safe Harbor acquired a license for its project from the Federal Power Commission, and there-

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[7] The Middle District of Pennsylvania has recently held that Safe Harbor sells all of its output to Penn Water and Consolidated by the terms of the Safe Harbor Agreement and that the Pennsylvania Public Utility Commission has no jurisdiction whatever over Safe Harbor's rates. See *Consolidated Gas Electric Light and Power Co. v. Siggins, et al.*, 99 F. Supp. 151 (1951).

after *all* of its rights and duties, as an interstate public utility on navigable water, emanated from such federal license.[8] The license *completely* covered *all* of Safe Harbor's activities. Safe Harbor has done nothing except what the Federal Government has licensed it to do. The Safe Harbor Agreement is one for a licensed interstate sale, for resale, of energy *from* a licensed project, and all of its provisions are incidental to, and part of, such licensed interstate sale. Section 8 of the Federal Power Act (U.S.C. A., Title 16, Sec. 801) provides:

> "No voluntary *transfer* of any license, or *of the rights thereunder granted,* shall be made without the written approval of the commission * * *."

Art. 25 of Safe Harbor's license provided that none of Safe Harbor's "franchises" or "rights of occupancy and use", which must include sale, could be voluntarily "transferred" to another without the approval of the Federal Power Commission. Thus, Congress and its agency has thereby pre-empted, and excluded the State of Pennsylvania from, the field of permitting Safe Harbor to transfer any of its rights and franchises. This has rendered the statute of Pennsylvania set forth in footnote 2, *supra,* completely inapplicable as a matter of law, even if the Safe Harbor Agreement could be construed, as we submit it cannot be, to effect a transfer of Safe Harbor's franchises and powers within the meaning of that Pennsylvania statute.

Since August 26, 1935, the effective date of Part II of the Federal Power Act (U.S.C.A., Title 16, Secs. 824-824h),

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[8] By Sec. 4 of the Federal Power Act (U. S. C. A., Title 16, Sec. 797) the Federal Power Commission is authorized to issue licenses expressly covering the "operating" of powerhouses on, and the "utilization of power * * * *from* * * * any of the streams or other bodies of water over which Congress has jurisdiction". Safe Harbor's license in terms permitted it to construct, operate and maintain its hydroelectric plant and to utilize (and therefore sell) power *from* the Susquehanna River.

Safe Harbor has also been a "public utility", subject to the plenary and immediate jurisdiction of the Federal Power Commission over all of its facilities and over all of its interstate rates, services and "contracts" relating thereto, including the Safe Harbor Agreement. The Safe Harbor Agreement in its entirety has been, and is, Safe Harbor's tariff of rates and services on file with the Federal Power Commission.

As the result of a plenary investigation begun September 1, 1944, and concluded November 4, 1946, the Federal Power Commission exercised its jurisdiction, under both Parts of the Federal Power Act, over the Safe Harbor Agreement as a filed tariff, and, in its opinion and order, reciting that the Safe Harbor Agreement was "the subject of this proceeding", found that all of Safe Harbor's sales were in interstate commerce to Penn Water and Consolidated, at wholesale for resale. After modifying the original Safe Harbor Agreement in two respects only, the Commission *required* Safe Harbor to file the entire Safe Harbor Agreement, as so revised, as its schedule of rates and charges effective January 1, 1947 (R. 115). This order bound not only Safe Harbor but Penn Water as well, because Penn Water made itself a privy by having its own counsel appear for Safe Harbor in the proceedings and by controlling this litigation in which Penn Water had an important financial interest (R. 65). On review, this order was affirmed by the Third Circuit in an opinion which announced that "Safe Harbor's contracts for power and its backing by the Pennsylvania and Maryland Companies are exemplary." See *Safe Harbor Water Power Corporation v. Federal Power Commission*, 179 F. 2d 179, 199 (1949), cert. den. 339 U. S. 957.

The said order of the Federal Power Commission modified the original Safe Harbor Agreement only to the extent of (1) lowering the pecuniary rates of Safe Harbor charged under Article V of the Agreement from rates providing a 7% return to rates providing a 5% return, and (2) pro-

viding, in effect, that, if there should be any output from any additions Safe Harbor might make to its plant, such output also would be sold to Penn Water and Consolidated on the same terms as the output from Safe Harbor's initial seven-generator plant,—in other words, that the same fair return of 5% would automatically in the future "be charged to Safe Harbor's two customers", Penn Water and Consolidated, upon Safe Harbor's investment in used and useful additions to plant. The order thereby effected an amendment to the last sentence of Article III (a) of the Agreement, which had originally provided that any such output from such hypothetical additions, except as otherwise required by law, should not be sold to others without the consent of Penn Water and Consolidated.

Although, by reason of waterpower limitations, Safe Harbor is physically unable to install additional generators or to generate additional output from additions to plant, it has from time to time, freely and upon its own initiative, installed substantial plant improvements and additions costing thousands of dollars. It has had every incentive to do so, because Penn Water and Consolidated have paid Safe Harbor the same pecuniary rate upon such investments as upon its investment in the initial plant. Since the above amendment to the Safe Harbor Agreement, Penn Water and Consolidated are clearly the contract purchasers of the output from such additions, if additional generating facilities can ever become feasible.

Except for these modifications, the Commission's order left the rest of the Safe Harbor Agreement, including Articles III(a), IV (last sentence) and XIV, completely untouched and approved. The Federal Power Commission, which attempted to intervene as a party in the present case before the Fourth Circuit, formally represented to the Court of Appeals in the present case that its said order of November 4, 1946, constituted an approval by the Commission of the Safe Harbor Agreement as so modified, including approval, as appropriate to the interstate power

pool, of the very provisions thereof which the Court of Appeals has found objectionable.

QUESTIONS PRESENTED

In the light of the foregoing Statement, the Questions Presented are six in number. They are:

1. Did the District Court and the Court of Appeals in this case have jurisdiction to declare the Safe Harbor Agreement invalid, as violative of the Sherman Act and laws of Pennsylvania, or was *primary* jurisdiction with regard to the validity of the Safe Harbor Agreement, as the filed and prescribed interstate tariff of a federal licensee, vested in the Federal Power Commission by the provisions of the Federal Power Act?

2. Assuming the jurisdiction of the Court of Appeals, was it reversible error for it to strike down the Safe Harbor Agreement as *per se* invalid on its face, *by summary judgment,* notwithstanding the record presented numerous uncontradicted facts, and genuine issues as to material facts, tending to show the reasonable and lawful nature, interpretation, purpose, operation and effect of the Safe Harbor Agreement, and its compliance with the Rule of Reason, including its approval, as reasonable and in the public interest, by state and Federal regulatory authorities and its compliance with constitutionally applicable state and Federal law?

3. Is the Safe Harbor Agreement invalid on its face, as *per se* in violation of the Sherman Act, because it contained the provisions set forth in Article III(a), IV (last sentence) and XIV thereof, which separable provisions, properly interpreted, merely (a) required Safe Harbor to install additional machinery and equipment in response to reasonable requests of its two creators, owners and customers; (b) prevented Safe Harbor from making only such side agreements with either of its two creators, owners and

customers as would work against the efficiency and economy of the joint undertaking, and (c) set up an Operating Committee with powers and functions limited to "investigation, consultation and advice in all operating, engineering and accounting matters pertaining to this agreement"?

4. Is the Safe Harbor Agreement invalid on its face as *per se* in violation of the Sherman Act, simply because it was entered into contemporaneously with a separate, distinct and independent contract between two of the parties to the Safe Harbor Agreement (i.e., the "Penn Water Contract" held illegal, erroneously we believe, in *Pennsylvania Water and Power Co.* v. *Consolidated Gas Electric Light and Power Co.*, 184 F. 2d 552 (C. A. 4, 1950)), and because each of these contracts separately constituted an implementation of a lawful underlying purpose to create a regulated economic and efficient electric power pool for an interstate region necessary for the utilization of large quantities of fluctuating hydroelectric energy?

5. Is the Safe Harbor Agreement invalid on its face as *per se* contravening a statute of Pennsylvania (*supra*, note 2) requiring approval by the Pennsylvania Commission of a "transfer" by a public utility of that State of its powers and franchises, notwithstanding (a) the Safe Harbor Agreement provides for no such "transfer", (b) the record contains genuine issues of fact that the Agreement has not so operated and that it has been approved by the Pennsylvania Commission, and (c) any state requirement of approval of such "transfer" by the Pennsylvania Commission is constitutionally inapplicable to Safe Harbor, a licensee under the Federal Power Act, by reason of Sec. 8 of that Act (U. S. C. A., Title 16, Sec. 801), which confers the powers to approve such transfer exclusively upon the Federal Power Commission?

6. Is the Safe Harbor Agreement invalid on its face as *per se* contravening the public policy and common law of Pennsylvania (including the state law of *ultra vires*), not-

withstanding (a) the constitutional inapplicability of such state law to the Safe Harbor Agreement, which complies with the paramount public policy of Congress as expressed in the Sherman Act and the Federal Power Act, (b) the fact that the Safe Harbor Agreement does not provide any surrender by Safe Harbor to others of its initiative as a public utility (and the initiative of its directors), to conduct its operations, to expand its plant and activities, and to apply to any governmental authorities having jurisdiction to increase its corporate or franchise powers, or to regulate its rates, operations and services, and (c) the genuine issue of fact that the Safe Harbor Agreement has not operated to effect such surrender?

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals that the Federal Power Commission lacked primary jurisdiction over the Safe Harbor Agreement and that said Agreement is open to collateral attack in this case *conflicts* with the decision on the same matter of the District of Columbia Circuit in *Pennsylvania Water and Power Co., et al. v. Federal Power Commission, et al.*, decided July 3, 1951, *cert. granted* February 4, 1952. Effective review of the last mentioned case by this Court requires consideration by this Court of the instant case.

The Court of Appeals in the instant case stated that its decision on this point conflicts with the said decision of the District of Columbia Circuit (R. 245).

2. The decision of the Court of Appeals that the Safe Harbor Agreement is invalid on its face as *per se* in violation of the Sherman Act *conflicts* with an alternative ground of decision and reasoning on the same matter of the District of Columbia Circuit in *Pennsylvania Water and Power Co., et al. v. Federal Power Commission, et al.*, decided July 3, 1951, *cert. granted* February 4, 1952.

Since the other alternative ground of the District of Columbia Circuit's decision was that the question of va-

lidity under the Sherman Act was not timely raised before the Federal Power Commission, this Court reviewing that decision may not be required to reach the Sherman Act point. The instant case, and this petition for review of it, directly raise the question of the validity of the Safe Harbor Agreement under the Sherman Act.

3. The decision of the Court of Appeals *conflicts* with the decision and order of the Federal Power Commission, dated November 4, 1946 (5 F.P.C. 221, 265), modifying and approving the Safe Harbor Agreement and ordering the same to be filed and observed by Safe Harbor as its filed tariff; and *conflicts* with the decision of the Third Circuit affirming said order of the Federal Power Commission in *Safe Harbor Water Power Corporation v. Federal Power Commission,* 179 F. 2d 179 (C. A. 3, 1949), cert. den. 339 U. S. 957.

4. The Court of Appeals in this case has decided the following important questions of Federal law in a way *conflicting* with applicable decisions of this Court:

(a) The holding that the Federal Power Commission lacks primary jurisdiction over the question of the validity of the Safe Harbor Agreement *conflicts* with the provisions of the Federal Power Act, which expressly empower the Commission to determine and fix by order just and reasonable contracts and contractual arrangements between public utilities which affect their rates and services and to authorize changes therein, and requires the Commission in so doing to apply Sherman Act standards appropriate to this specialized field (made so adaptable by the Rule of Reason).[9] This holding also *conflicts* with *U. S.*

[9] U. S. C. A. Title 16, Sec. 803(h) prohibits, as a condition of the license, contracts made by "licensees" in unlawful restraint of trade, and thereby makes such restraints a violation of the Federal Power Act as well as of the Sherman Act. Sec. 825h

Navigation Co., Inc. v. Cunard S. S. Co., 284 U. S. 474 (1932) and with *Terminal Warehouse Co. v. Pennsylvania R. Co.*,. 297 U. S. 500 (1936). The cases of *U. S. v. Borden Co.*, 308 U. S. 188 (1939) and *U. S. Alkali Association v. U. S.*, 325 U. S. 196 (1945) are inapplicable. They were suits by the Attorney General and not by private parties. A combination which included parties and subject matter not subject to the jurisdiction of the Secretary of Agriculture was involved in the *Borden Co.* case, and the powers of the Federal Trade Commission involved in the *Alkali Association* case were merely investigatory.

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thereof empowers the Federal Power Commission by order to enforce the provisions of the Act. Sec. 825*l* provides the exclusive method by which such orders of the Commission may be reviewed by the Courts of Appeals. Sec. 824a (b) authorizes the Commission to require a "public utility", if its generating facilities and output are sufficient for the purpose, to establish physical connections with, and make sales of energy to, other electric companies and to *"prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them."* Sec. 824d requires "all *contracts* which in any manner affect or relate to such rates, charges, classifications and services" for interstate sales by public utilities of energy at wholesale to be filed with the Commission, and prohibits *any changes* in such contracts until after thirty days' notice to the Commission and the public. Sec. 824e empowers the Commission, if it finds that any rate, charge or classification in such sale, or any *"contract affecting* such rate, charge or classification is unjust, unreasonable, unduly discriminatory or preferential", to *"determine* the just and reasonable * * * *contract* to be *thereafter observed and in force"* and to *"fix the same by order"*. Sec. 824f empowers the Commission, in case any interstate service of a public utility is inadequate, to determine the proper service to be rendered and to "fix the same by its order". Sec. 801 provides that "no voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the Commission".

The decision of *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439 (1945) relied on by the Court of Appeals has, we submit, been misinterpreted and misapplied. That decision permitted a suit challenging an alleged underlying conspiracy of common carriers but expressly permitted no collateral court attack upon a rate tariff under the jurisdiction of the Interstate Commerce Commission. The present case represents a collateral attack on a public utility's filed tariff itself.

(b) The holding that the Safe Harbor Agreement can be adjudged illegal by *summary judgment*, notwithstanding the Record contains genuine issues as to facts material (1) to its validity, (2) to its separability from the Penn Water Contract and (3) to the separability of the invalidated secondary and academic provisions of the Safe Harbor Agreement from its valid primary provisions, *conflicts* with the decisions of this Court hereinafter cited requiring application of the Rule of Reason to all restraints except those which effect price fixing, monopoly, boycott, or the exclusion of competitors from a market, and constitutes a direct violation of Rule 56 of the Federal Rules of Civil Procedure. It conflicts with *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620 (1944) and *Arenas v. U. S.*, 332 U. S.. 419 (1944). See also as to separability, A. L. I. Rest. Contracts sec. 603 and comment a. In so disregarding this Rule, the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of this Court's power of supervision" (Rule 38, Supreme Court Rules).

(c) The holding that the Safe Harbor Agreement can be adjudged illegal on its face as *per se* in violation of the Sherman Act, and without a determination of its reasonableness under the factual criteria of the

Rule of Reason, conflicts with *Standard Oil Co. v. U. S.*, 221 U. S. 1 (1911); *Board of Trade of Chicago v. U. S.*, 246 U. S. 231 (1918); *U. S. v. Bausch & Lomb Co.*, 321 U. S. 707, 728-9 (1944), (exclusive dealing arrangement); *U. S. v. Yellow Cab Co.*, 332 U. S. 218 (1947), 338 U. S. 338 (1949), (vertical and horizontal integration); *U. S. v. Columbia Steel Co.*, 334 U. S. 495 (1948) (horizontal integration); *U. S. v. Paramount Pictures*, 334 U. S. 131, 173-4 (1948), (vertical integration by stock control and ancillary contracts).

The Sherman Act requires the application of a standard and is not an unqualified prohibition like that contained in Sec. 3 of the Clayton Act. See *Standard Oil Co. of California v. U. S.*, 337 U. S.. 293, at 311-313 (1949).

The fact that the Safe Harbor Agreement was subject to regulation by the Federal Power Commission and that it has been regulated, approved, and its observance ordered by that Commission argues strongly that it complies with the Rule of Reason. If the Rule of Reason is observed and applied in this case, the Sherman Act and the Federal Power Act, and the underlying policies of the two enactments, can be read together and accommodated. The statutory standard of the Federal Power Act is reasonableness. "Just and reasonable" rates, services and contracts of licensees and public utilities subject thereto are the objectives of that Act. Such is also the statutory standard which has been read into the Sherman Act. The Federal Power Commission, in administering the Federal Power Act, must observe and apply Sherman Act standards and give them the limited application appropriate to this field; and, since this is so, when it has applied the standards of reasonableness and public interest to the Safe Harbor Agreement and has found it to comply with those standards, such determination should be held extremely relevant and material upon the question of its compliance with the Rule of Reason.

It is by no means certain that the District Court or the Court of Appeals held that the Safe Harbor Agreement constituted price fixing. The opinions of the lower Courts did not say so. Any assumption that they did so hold must rest upon the reliance which these Courts placed upon *Pennsylvania Water and Power Co. v. Consolidated Gas Electric Light and Power Co.*, 184 F. 2d 552 (C. A. 4, 1950). That case held that price fixing was effected by the totally different provisions of the Penn Water Contract, which do not appear in the Safe Harbor Agreement and which provided for sales by Penn Water of certain of its product to outsiders and gave Consolidated a controlling and veto power over any such sales which Penn Water might make. The terms of the Safe Harbor Agreement, particularly after the amendment thereto resulting from the Federal Power Commission's Order of November 4, 1946, whereby Penn Water and Consolidated purchase *all* of Safe Harbor's output—including not only the output from its initial plant, but also any hypothetical output there may be from additions to plant,—makes erroneous and unsound any holding that the Safe Harbor Agreement fixed Safe Harbor's prices to others. Under the Safe Harbor Agreement, as amended, there could be no sales by Safe Harbor to others, the prices of which could be fixed.

The finding of the Court of Appeals that Safe Harbor is in potential competition with Penn Water and Consolidated, notwithstanding the record facts heretofore set forth in Section (e) of the Statement in this Petition, *conflicts* with *U. S. v. Yellow Cab Co.*, 332 U. S. 218, 229 (1947), holding that concerns are not in potential competition within the meaning of the Sherman Act if such competition is "impractical and unlikely". Such finding of potential competition is also completely inconsistent with the implied holding of the Court of Appeals that the provisions of the Safe Harbor Agreement, whereby Penn Water and Consolidated purchased Safe Harbor's entire output, if such provisions stood alone, are entirely legal as creat-

ing Penn Water's "rightful entitlement" and Consolidated's "rightful entitlement". This is so, because Penn Water and Consolidated's lawful purchase of Safe Harbor's entire output would, in and of itself, prevent Safe Harbor's competition with them, if otherwise possible.

Furthermore, the proposition, which the Court of Appeals apparently subscribed to, that the Sherman Act requires competition between parent companies, on the one hand, and, on the other, a *wholly new business* of their subsidiary, which wholly new business these parent companies *created* and did not acquire from others, and which had never before been in competition with anyone, *is a proposition which has never been sanctioned by any decision of this Court.* All of the decisions of this Court holding illegal the elimination of competition between affiliated companies were rendered in cases in which the business of such affiliates had formerly been in independent competing hands and their acquisition and subsequent affiliation suppressed such *pre-existing competition.* These cases are: *Northern Securities Co. v. U. S.,* 193 U. S. 197 (1904); *U. S. v. Terminal Railroad Association of St. Louis,* 224 U. S. 383 (1912); *U. S. v. Reading Co.,* 253 U. S. 26 (1920); *U. S. v. Crescent Amusement Co.,* 323 U. S. 173 (1944) and *Timken Roller Bearing Co. v. U. S.,* 341 U. S. 593 (1951). See also *U. S. v. Yellow Cab Co.,* 332 U. S. 218 (1947), 338 U. S. 338 (1949) and *U. S. v. Columbia Steel Co.,* 334 U. S. 495 (1948).

In the *Timken* case, *supra,* British Timken had long been in pre-existing competition with American Timken before their affiliation, and their newly created subsidiary, French Timken, *acquired* trademark rights in France which had been in independent competing hands.

In *Keifer--Stewart v. Seagram & Sons, Inc.,* 340 U. S. 211 (1951) there was no holding that a parent corporation and its wholly owned subsidiary must compete with each other. The decision was that such affiliates could not lawfully conspire to eliminate competition from *independent*

wholesalers and to fix such independent wholesalers' resale prices.

In *U. S. v. Griffith*, 334 U. S. 100 (1948), and *Schine Chain Theatres, Inc. v. U. S.*, 334 U. S. 110 (1948), and *U. S. v. Paramount Pictures, Inc.*, 334 U. S. 131 (1948), a group of affiliated companies used conspiracy and group monopoly powers to defeat *competition offered the group from outside theatres.* No competition *between* parent and subsidiary corporations was required by these decisions.

(d) The holding that the Safe Harbor Agreement is illegal on its face as *per se* in violation of local laws and public policy of Pennsylvania, notwithstanding (1) that the Agreement in its entirety constitutes a contract subject to the Federal Power Act, (2) that it constitutes, in its entirety, a tariff prescribed by the Federal Power Commission, and (3) that any transfer of Safe Harbor's rights under its Federal license is governed by Sec. 8 of the Federal Power Act, erroneously gives unconstitutional effect to local State law which has been rendered inapplicable by the assertion of paramount Federal law and public policy (namely, that contained in the Federal Power Act and the Sherman Act). Such holding violates the Commerce Clause of the Federal Constitution and conflicts with *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927); *Missouri v. Kansas Gas Company*, 265 U. S. 298 (1924); *Bush Co. v. Maloy*, 267 U. S. 317 (1925); *Buck v. Kuykendall*, 267 U. S. 307 (1925); *Adams Express Co. v. New York*, 232 U. S. 14 (1914); *Sault Ste. Marie v. International Transit Co.*, 234 U. S. 333 (1914); *West v. Kansas Natural Gas Co.*, 221 U. S. 229 (1911); *Mayor of Vidalia v. McNeely*, 274 U. S. 676 (1927), and *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U. S. 525 (1949).

Nullification of the Safe Harbor Agreement would destroy the contractual basis for what both Courts below held to be Consolidated's "rightful entitlement" to the eco-

nomical output of the Safe Harbor project. This grave jeopardy to the interstate power pool necessary for a regional district and to the participation of the people of Maryland in the benefits of hydroelectric power from the Susquehanna River, presents a problem of great public significance and importance. Like its conflicting case, now awaiting argument before this Court, this case should be reviewed.

Wherefore, it is respectfully submitted that this Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit should be granted.

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February 23, 1952.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 612

PUBLIC SERVICE COMMISSION OF MARYLAND,
Petitioner,

vs.

PENNSYLVANIA WATER AND POWER COMPANY
AND
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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of Maryland.

Baltimore, Maryland,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. ------

PUBLIC SERVICE COMMISSION OF MARYLAND,
Petitioner,

VS.

PENNSYLVANIA WATER AND POWER COMPANY
AND
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Public Service Commission of Maryland (hereinafter called the "Maryland Commission") prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit dated January 3, 1952 (R. 231) which affirmed a summary declaratory judgment of the United States District Court for the District of Maryland dated May 21, 1951 (R. 1-2).

This judgment declared invalid on its face a long-term contract by Safe Harbor Water Power Corporation (hereinafter called "Safe Harbor") for the wholesale sale in interstate commerce of its entire output of hydroelectric

power and energy to Pennsylvania Water & Power Company (hereinafter called "Penn Water") and Consolidated Gas Electric Light and Power Company of Baltimore (hereinafter called "Consolidated"), the cooperation of the latter companies having made possible the Safe Harbor project. This contract (hereinafter called the "Safe Harbor contract"), consisting of an original agreement dated June 1, 1931, and two supplements of August 1, 1932 and November 22, 1939, appears in the Record, pages 91-112. Generally, it provides that Safe Harbor shall sell its entire output of hydroelectric power and energy to Penn Water and Consolidated for a period of fifty years, dating from June 1, 1931, in proportions of one-third to Penn Water and two-thirds to Consolidated, thus conforming to the proportion of stock ownership of Safe Harbor by those two companies in their jointly created Safe Harbor project.

OPINIONS BELOW

The Opinion of the District Court, Record 3-9, is reported in 97 F. Supp. 952. The Opinion of the Court of Appeals for the Fourth Circuit has not yet been reported, but will be found at page 231 of the Record.

JURISDICTION

The jurisdiction of this Court is invoked under Sections 1254 and 2101 of the Judicial Code (USC Title 28).

STATEMENT

This petition questions the correctness of a decision by the U. S. Court of Appeals for the Fourth Circuit, in affirming a *summary* declaratory judgment of the U. S. District Court. This summary judgment struck down in its entirety the Safe Harbor contract although that contract has operated successfully and in the public interest for twenty

years, and, furthermore, has been approved and prescribed as a filed tariff by the Federal Power Commission (hereinafter referred to as "FPC") in an Order affirmed by the United States Court of Appeals for the Third Circuit, with certiorari denied by the United States Supreme Court, in *Safe Harbor Water Power Corp. v. Federal Power Commission*, 179 F. 2d 179, cert. denied 339 U. S. 957 (1950).

The Maryland Commission has been a party to the various Commission and Court cases concerning the rates, services, and contracts of Penn Water and Safe Harbor with Consolidated, which have been heard and decided during the past seven years.* It has actively participated in these cases because of its duty to see that the Maryland public receives its fair share, at just and reasonable rates, of the hydro power generated by the Susquehanna River. In fact, the Maryland Commission's insistence upon this premise, as a prerequisite to a proper determination of its own 1944 Rate Case against Consolidated (XXXV PSC Rep. of Md. 40; XXXVI PSC Rep. of Md. 86, 87), led our Commission to submit to the FPC the problem of the justness and reasonableness of Consolidated's payments for hydroelectric power generated by Penn Water and Safe Harbor. The proceedings before FPC, and particularly Penn Water's effort to avoid its jurisdiction, led Penn Water in those proceedings to attack Consolidated's (and indirectly the Maryland public's) right to the

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* *In the Matter of Pennsylvania Water & Power Company*, FPC Docket IT-5915, FPC Opinions 173 and 173A (1949); affirmed by the U. S. Court of Appeals for the District of Columbia, .. F. 2d .., (July 3, 1951), cert. granted February 4, 1952 (October Term 1951, Nos. 428, 429); *Safe Harbor Water Power v. Federal Power Commission*, 179 F. 2d 179, cert. denied 339 U. S. 957 (1950); *Consolidated G. E. L. & P. Co. of Baltimore v. Siggins et al*, 99 F. Supp. 151; *Consolidated G. E. L. & P. Co. of Baltimore, et al. v. Pennsylvania Water & Power Co., et al.*, 184 F. 2d 552, 186 F. 2d 934, cert. denied 340 U. S. 906 (1950); and the instant case.

benefit of two-thirds of the output of Safe Harbor's present plant, which continues as a major objective of Penn Water in the current proceeding.

The Maryland Commission maintained in all of these cases that Consolidated (and through it, the Maryland public) is entitled to two-thirds of the Safe Harbor output under the Safe Harbor contract and at reasonable rates to be established by FPC. We took this consistent course of action because the disputes stemmed from this Commission's original action in initiating the FPC rate cases; and, even more importantly, because the Maryland public's rightful share of the Susquehanna River hydro power is seriously jeopardized by Penn Water's repudiation of and attack upon Consolidated's rights to its contract two-thirds share of the Safe Harbor output.

The real issue goes deeper than the validation of the Safe Harbor contract. Substantially all of the hydro power generated from the Susquehanna River in Maryland goes to Pennsylvania by means of the Conowingo project. The Maryland Commission originally authorized and has continued to acquiesce in this transfer of power, from Maryland to Pennsylvania, in reliance upon the transmission of upriver power from Pennsylvania to Maryland. If the Safe Harbor contract is stricken down in these proceedings then the Maryland public's share of Susquehanna hydro power will be seriously jeopardized by a *summary judgment issued without even an opportunity for the Maryland public to present the facts of its case in Court.*

It is our Commission's duty to regulate and watch Consolidated's retail rates closely. Through prompt and direct negotiation with Consolidated, our Commission secured a 1950 reduction in Consolidated's electric retail rates as a

result of the reduction ordered by the FPC in Safe Harbor's wholesale rates, just as soon as this Court's denial of certiorari confirmed the Third Circuit's affirmance of the FPC reduction. *Safe Harbor Water Power Corp. v. F. P. C.*, 179 F. 2d 179 (1949), cert. denied 339 U. S. 957 (1950). We propose to see that the benefit of the reduction ordered by the FPC in the Penn Water rate case is similarly enjoyed by the Maryland public, if the decision of the United States Court of Appeals for the District of Columbia becomes final through ultimate affirmance by this Court (October Term 1951, Nos. 428, 429).

As repeatedly contended by Penn Water and the Pennsylvania Public Utility Commission in their petitions for certiorari which were granted by this Court on February 4, 1952, to review the judgment of the Court of Appeals for the District of Columbia, in the cases of *Pennsylvania Water & Power Co. v. Federal Power Commission et al.* (Current Term No. 428) and *Pennsylvania Public Utility Commission v. Federal Power Commission* (Current Term No. 429), this case is closely related to those cases. In those cases, the petitioners referred to the opinion of the Court of Appeals for the Fourth Circuit herein as a primary basis for their contention of a conflict between circuits. *A fortiorari*, the conflict between circuits *explicity expressed* by the Court of Appeals in *this case* (pp. 16-22 of the Opinion, R. 244 et seq.) calls for a review of the instant decision.

This case involves an issue of great importance to the Maryland public (as well as issues of great national importance in the proper interpretation of the Federal Power Act), in that it destroys in its entirety the contractual basis of Consolidated's (and through it the Maryland public's) entitlement to two-thirds of the output of the Safe Harbor hydroelectric development on the Susquehanna River. This

development was made possible by the contract herein condemned by the Fourth Circuit, and by the fact that Consolidated furnished two-thirds of the Safe Harbor's equity capital and guaranteed its entire bonded indebtedness.

For 20 years Consolidated has guaranteed Safe Harbor's operating expenses and return, and made possible the successful marketing of its power. The Maryland public, through rates paid by it to Consolidated, has been the real underwriter. As long as Penn Water collected a handsome 7% return (or better as to its investment in its own Holtwood Project), guaranteed through Consolidated and the Maryland public, and as long as it had no adequate market for its own or Safe Harbor's power elsewhere, there was no complaint from Penn Water (or the Pennsylvania Commission, with which the contracts were on file from their inception) as to the validity of its power contracts. Only when substantial reductions in the wholesale power rates were made through orders of the FPC, did Penn Water repudiate its obligations of 20 years, through setting aside not only its own wholesale service contract to Consolidated (the Penn Water contract case—which we believe was erroneously determined) but also the wholesale service contract of Safe Harbor (herein involved).

Penn Water's basic purpose in pursuing this course has been the avoidance of FPC jurisdiction, as announced to the Fourth Circuit by its counsel in the Penn Water contract case, and as asserted in the pending litigation in Nos. 428 and 429 before this Court.

The accomplishment of this purpose will not secure more economic utilization of hydro resources or lower rates for power to the public either in Pennsylvania or in Maryland, but will, in our belief, result in considerable disadvantage to the Maryland public. The verbal reassurances of Penn

Water to the Fourth Circuit (repeated in the latter's opinion) are of little solace to the Maryland public in the light of the announced purposes of Penn Water to deny to Maryland its fair share of Safe Harbor power and to set aside the FPC rate reductions. The attack on the FPC orders in Cases Nos. 428 and 429 is largely predicated upon the Fourth Circuit's affirmance of a summary judgment herein without inquiry into the facts.

The Maryland Commission takes emphatic exception to the Fourth Circuit's *summary* invalidation of the Safe Harbor contract and the consequent denial by it of any inquiry into the facts. In this case, Penn Water has attempted to continue the synthetic picture of its operations, set up in its offers of proof in the Penn Water contract case (184 F. 2nd 552) by partial quotations from various records and documents which were not even received in evidence and which could have been controverted if they had been admitted. It seeks to create the far-fetched impression that it is a small company, being gradually strangled by a series of restrictions forced upon it by Consolidated and designed to restrain trade.

Such was never the case, as is shown by the affidavits of Robert T. Greer and Ralph L. Thomas (R. 115, 123), in the instant proceeding. On the contrary, both the Penn Water and Safe Harbor contracts were drafted to conform to plans prepared by the officers of Penn Water, and resulted in considerable (perhaps excessive) profits for Penn Water throughout the years. (See the Record before the FPC and Opinions 173 and 173A, on review in Nos. 428 and 429 now before this Court).

A brief survey of historical facts is important to an understanding of the entire picture. In 1910, construction of the Holtwood hydroelectric project was completed by Penn

Water, which was organized by a syndicate formed by John E. Aldred to revive the failing hydroelectric project begun at Holtwood, Pennsylvania, by the McCall's Ferry Power Company, then in receivership. A large outlet for hydroelectric power had to be procured to assure the success of the undertaking, and Penn Water looked primarily to the Baltimore area. Power contracts were made with Consolidated and with the United Railways & Electric Company (the Baltimore street railway system) in Baltimore. Later this service was coordinated and rendered more effective, from Penn Water's point of view, by having Consolidated take over the responsibility for the United Railways contract and enter into a long term contract in 1927 (to run for 50 years) for the purchase of hydroelectric energy from Penn Water.

All of this was facilitated by the fact that the Aldred interests had acquired voting control of Consolidated. In the meantime, Penn Water had obtained certain short-term renewable contracts for service in Pennsylvania to the Lancaster, York, and Coatesville areas (the areas now served respectively by the systems of Pennsylvania Power and Light Company, Philadelphia Electric Company, and Metropolitan Edison Company, large utility systems each as large or larger than Consolidated's).

In the years following 1927, the Safe Harbor project came to fruition. Penn Water had been acquiring upstream rights in contemplation of the possibility of a newer, larger and more modern hydroelectric plant with a possible market for a considerable block of its power through the planned electrification of the Pennsylvania Railroad. Penn Water was unable to accomplish such an objective, however, without further assurances of substantial financial assistance and of a market for the large amount of addi-

tional fluctuating hydro power that would be produced. Integration of the proposed additional run-of-the-river hydro plant with the steam generating resources of a utility such as Consolidated, or one of the large Pennsylvania systems, was essential to its success. Penn Water first unsuccessfully sought the collaboration of the several large Pennsylvania companies, but finally accomplished the Safe Harbor project through, and only through, the cooperation of Consolidated in entering into the 1931 contract which has been condemned in this case, although it has operated successfully in the public interest for twenty years.

The contract was not devised (1) to produce or effect "strangulation," as stated by the District Court and quoted by Judge Soper in the opinion which we here seek to have reviewed, or (2) as "an integral part of an illegal plan," as described by Judge Soper speaking for the Fourth Circuit. On the contrary, it was entered into as the best means of making possible the harnessing of a great natural resource for the benefit of the public, and, as recently as 1944, was described by the then president of Penn Water (Mr. Walls) in his testimony before the Federal Power Commission as follows:*

> "The result was that the fullest coordination of the facilities of Penn Water and of its customers in the interest of the economical utilization of the power potentialities of the power pool to meet most adequately the integrated requirements of the pool for the final benefit of the ultimate consumer, was not effected until the present contractual arrangements were devised in 1931.

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* Record in *Pennsylvania Water and Power Company v. Federal Power Commission, et al* (current term 428, volume 1, pages 25-26. See also similar evidence of Mr. Spaulding, now president of Penn Water, *circa* p. 69.) The surrounding and intervening testimony in that Record contains complete factual support for the above historical summary, which also is supported herein in the affidavits of Messrs. Greer and Thomas, Record, pp. 115 and 123.

"* * *

"It was not until further contractual arrangements had been made in 1931 by which Consolidated Gas' payments to Penn Water and Safe Harbor Company were placed on the basis of an annually computed lump sum, independent of the number of kilowatts and kilowatt hours, that the last contractual obstacle disappeared and the most economical result obtainable from the combined power resources could be derived."

Indeed, the opinion of the Fourth Circuit (R. 241) recognizes the nature of Safe Harbor's operations which called for the integrated power pool established by the contract. It refers to the Federal Power Commission's control thereof, and concludes: "That the plan established by Penn Water and Consolidated is operative cannot be doubted since the experience of twenty years shows that it is *practicable* and *successful*." However, the opinion then proceeds to state that FPC had not approved the entire contract or prescribed it in its entirety as a rate schedule. No justification can be devised for such a summary decision of the Fourth Circuit as to the intended scope of the FPC order in the Safe Harbor rate case—a decision flatly contrary to the very terms of the FPC order, flatly contrary to the tariff as refiled by Safe Harbor in compliance with that order, and flatly contrary to the assertions of FPC in its motion for leave to intervene (R. 220).*

* Said motion (R. 221), par. II, reads: "As will more fully appear in the brief hereby sought to be filed, the contract provisions which the Court below has undertaken to nullify as violative of the anti-trust laws, were provisions *which the commission had prescribed* in the exercise of jurisdiction conferred upon it by the Federal Power Act * * * *as part of a rate schedule* governing the sale of electric energy" by Safe Harbor to Penn Water and Consolidated.

QUESTIONS PRESENTED

1. Did the District Court and the Fourth Circuit lack jurisdiction to declare the Safe Harbor contract invalid, because that agreement in its entirety was prescribed by FPC order (with reduction of rates) and was refiled by Safe Harbor as its FPC rate tariff in compliance with said order?

Assuming arguendo the jurisdiction of the District Court:

2. Was it reversible error to strike down the Safe Harbor contract by summary declaratory judgment, when the Record presented many disputed issues of material fact?

3. Was it reversible error to issue a summary declaratory judgment that the Safe Harbor contract was invalid on its face as a *per se* violation of the Sherman Act, because it contained the provisions set forth in Articles IIIa, IV (last sentence) and XIV thereof, when petitioners denied that those provisions had ever operated or been capable of operation in the manner alleged and asserted by respondents?

4. Was it reversible error to affirm a *summary* declaratory judgment that the Safe Harbor contract was invalid on its face, on the ground (not found by the District Court) that the Safe Harbor contract formed "an integral part of an illegal plan" when there was no showing of such fact and it was denied by answer and affidavit?

5. Was it reversible error to sustain a *summary* declaratory judgment that the Safe Harbor contract violates the provisions of the Public Utility Law of Pennsylvania, which requires approval by the Pennsylvania Commission of any "transfer" by a public utility of that State of its powers and franchises when: (1) the Safe Harbor contract on its face makes no such "transfer"; (2) the record shows genuine dispute as to the material fact of whether the contract has so operated; (3) the record shows genuine dispute as to

whether the Pennsylvania Commission has approved said agreement; and (4) any State requirement of approval of such "transfer" by the Pennsylvania Commission conflicts with the paramount power of FPC over Safe Harbor as a "licensee" and "public utility" subject to FPC jurisdiction?

6. Was it reversible error to affirm a summary declaratory judgment that the Safe Harbor contract is invalid on its face as *per se* contravening the public policy and law of Pennsylvania (including the State law of *ultra vires*) when (1) the agreement does not on its face show any surrender by Safe Harbor to others of its initiative and responsibility as a utility; (2) the record shows genuine dispute as to the material fact of whether throughout the years Safe Harbor has independently met its responsibilities in this respect; and (3) the State law of Pennsylvania cannot be properly applied to condemn an agreement, which in this respect is subject to the paramount policy and law of the Federal Government as expressed in the Federal Power Act and the rulings of FPC issued thereunder?

7. Was it reversible error to affirm a *summary* declaratory judgment that the *entire* Safe Harbor contract is invalid on its face because of certain provisions contained therein, when the Record shows genuine dispute as to the material fact of the separability of those provisions, and more particularly, a definite offer to eliminate those provisions from the contract accompanied by evidence that they had never operated and would not be essential to the future operation of the agreement in the public interest?

REASONS FOR GRANTING THE WRIT AND ARGUMENT

I.

The District Court Lacked Jurisdiction, in View of FPC Jurisdiction and the Doctrine of the "Filed Tariff". (Question 1)

We contended below and maintain here that the District Court lacked power to deal with the issues presented to it, for two reasons under well-established doctrines of administrative law of "primary jurisdiction", and "exhaustion of administrative remedies":

(1) The scope and intent of the Federal Power Act (16 U. S. C. A., Secs. 791a-825n, particularly Secs. 803h, 824a-824f) commits to FPC jurisdiction the power to deal comprehensively with restraint of trade combinations by utilities subject to that Commission's control. Therefore, the alleged violation by such utilities of the Sherman Act, through contracts or other activities subject to FPC control, may not be asserted in the first instance in the Courts, but first must be presented to FPC for its ruling, which ruling should then become controlling under the Rule of Reason, upon any appeal from such ruling to the Courts.

(2) A filed tariff constitutes the only lawful terms of service (including the manner and extent of service, as well as the charges therefor) for a "licensee" or "public utility" subject to FPC jurisdiction. It may be changed or set aside only by proper proceedings before the FPC, and may not be questioned collaterally in the first instance in Court (as is sought here by Penn Water).

The opinion of the Fourth Circuit in this case deals basically (as did its opinion in the Penn Water contract case) only with the first of these reasons. As to that reason, the

Court puts itself squarely in conflict with two decisions of the Court of Appeals for the District of Columbia and a decision of the District Court for the Middle District of Pennsylvania.

Pennsylvania Water and Power Company, et al. v. F. P. C., (July 3, 1951), ... Fed. (2d) ...., cert. granted, February 4, 1952, Nos. 428, 429;

S. S. W. Inc. v. Air Transport Assoc. of America, et al., (July 12, 1951), ... Fed. (2d) ...., cert. requested, February 2, 1952, No. 568;

Consolidated Gas Electric Light and Power Company of Balto. v. Siggins, et al., (August 7, 1951), 99 F. Supp. 151.

And see also:

Interstate Natural Gas Co. v. Southern Calif. Gas Co., (U. S. D. C., S. Calif., Jan. 29, 1952) 20 L. W. 2341.

The first of these was the Penn Water rate case appeal. In that case, Penn Water, departing from its prior protestations that FPC jurisdiction was not involved in the Fourth Circuit's action, insisted (and now in No. 428 insists to this Court) that the FPC orders should be set aside because of the Fourth Circuit's decision annulling the Penn Water contract and also its decision in the instant case annulling the Safe Harbor contract. The Court of Appeals for the District of Columbia affirmed the Commission's orders in their entirety, ruling that they could be changed only by proper proceedings under the Federal Power Act before FPC. The Court further held that the arrangements between Penn Water and Consolidated, which had received FPC approval, were lawful and would continue as tariffs, reasoning that operations which had FPC approval would be lawful even though certain provisions of contracts relating to such operations otherwise might fall within the ban of the Sherman Act.

This Court has granted certiorari to review the above decision of the Court of Appeals for the District of Columbia, upon petitions which vigorously asserted that the instant opinion creates a conflict of circuits which should be resolved. We respectfully submit that this case should be called up for joint review with cases Nos. 428 and 429, as a related action. Otherwise this case, by denial of certiorari, would be permitted to become *res judicata* between the parties upon a principle of law which may be found to be erroneous in the above cases, in which certiorari has been granted.

In denying the second of the reasons for lack of jurisdiction in the Courts below to hear this case, (i.e. the doctrine of the "Filed Tariff"), the Fourth Circuit places itself not only in controversy with the decisions above referred to, but also with the Third Circuit and others. The Safe Harbor contract has not only been filed with FPC as a tariff, but it has been refiled in pursuance of an order of that Commission changing only the rates and charges thereunder. This order was affirmed by the United States Court of Appeals for the Third Circuit in the Safe Harbor rate case, 179 Fed. 2d 179, cert. den. 339 U. S. 957 (1950). It cannot, under the doctrines of many cases, be attacked collaterally in this proceeding. *Northwestern Pub. Ser. Co. v. Montana-Dakota Utilities Co.*, 181 F. 2d 19, 22-23 (8th Cir. 1950), and cases cited therein, affirmed on other grounds, 341 U. S. 246 (1951).

To permit such an attack is to misconstrue the basic authority upon which the Fourth Circuit relied in the earlier Penn Water contract case, 184 F. 2d 552 (1950), and in its opinion herein. In the Penn Water contract case, as in the opinion below, the Fourth Circuit relied upon the decision in *Georgia v. Pennsylvania R.R. Co.*, 324 U. S. 439

(1945), as emphasizing that "railroad carriers are subject to the anti-trust laws although their rates are controlled by the Interstate Commerce Commission". Our position does not urge exemption of Safe Harbor from the anti-trust laws, but we do urge that if the application of the anti-trust laws involves a suit in the nature of a collateral attack on a filed tariff, as here, asking that it be declared null and void, then such attack must be denied except when made in the first instance before the proper Commission. By a 5-4 decision in the *Georgia* case, this Court allowed a suit by the State of Georgia to *enjoin a conspiracy in restraint of trade* by a group of railroads, but was careful to recognize and affirm the doctrines herein urged and to point out that *the case did not involve any attempt to annul a tariff*. The Court clearly recognized that an attempt to annul or set aside a tariff would fail. Referring to *North Dakota ex rel. Lemke v. Chicago & N. W. R. Co.*, 257 U. S. 485 (1922) and *Texas v. I. C. C.*, 258 U. S. 158 (1922), this Court stated in the *Georgia* case (p. 454):

> "It is clear that a suit could not be maintained here to review, annul, or set aside an order of the Interstate Commerce Commission. *Congress has prescribed the method of obtaining that relief. It is exclusive of all other remedies, including a suit by a State in this Court.* * * *" (Emphasis supplied.)

And, after referring to and quoting *Central Transfer Co. v. Terminal R.R. Assoc.*, 288 U. S. 469 (1933), which likewise involved application of the "primary jurisdiction" doctrine as explicitly embodied in the Clayton Act, this Court (p. 455), in referring back to all of these cases, continued:

> "* * * *We adhere to these decisions.* But we do not believe they or the principles for which they stand are a barrier to the maintenance of this suit by Georgia.
>
> "The relief which Georgia seeks is not a matter subject to the jurisdiction of the Commission. Georgia in

this proceeding is not seeking an injunction against the continuance of any tariff; *nor does she seek to have any tariff provisions cancelled.*" (Emphasis supplied.)

Thus, the clearly expressed opinion of this Court in the *Georgia* case was that if the suit had been filed to annul a tariff provision, without first taking the matter to the Interstate Commerce Commission, it would have been disallowed; although, the Court (by a narrow 5-4 margin) was willing to *enjoin* a combination where the order did not directly affect any filed tariffs. It is submitted that the *Georgia* case does not support the decision below; but if such a construction is possible, it should be limited and clarified by this Court in a reversal of the Fourth Circuit in this case.

The Fourth Circuit has also relied upon the cases of *U. S. Alkali Ass'n. v. U. S.*, 325 U. S. 196 and *U. S. v. Borden Co.*, 308 U. S. 188. Those cases are clearly distinguishable from the case at bar. In the first place, they were both cases brought by the *Government*, through the Department of Justice, which in bringing such suits, inferentially represents the policy of the Government in support of all of its statutes. There is a clear difference between a suit by the Government (there involved) and that of a private corporation (here involved), which is seeking private advantage by repudiation of an agreement to which it was a party and which it has accepted as a tariff for many years.

In that respect, the cases of *U. S. Navigation Co. v. Cunard S. S. Co.*, 284 U. S. 474, *Terminal Warehouse Co. v. Penn. R. R. Co.*, 297 U. S. 500, and *Keogh v. C. & N. W. Ry. Co.*, 260 U. S. 156 (1922), are the decisions of this Court which are applicable to the present case. In those cases, the Courts emphasized that private parties must exhaust their relief before the appropriate administrative board, before attacking in Court an arrangement on file as a tariff. As stated

above, this principle is not restricted to rates — it must apply to rates in relation to service, and contracts affecting such service and rates. (See *Montana-Dakota* case, *Pennsylvania Water and Power Co. v. F. P. C., supra,* and 16 U. S. C. A. Sec. 824d, 824e (a)).

Furthermore, in each of the above cases which are relied on by the Fourth Circuit, there had been only inaction by the regulatory agency asserted to have power to act. There was no finding or holding that, if the appropriate regulatory agency *had acted* (as it has in this case) even the Government would have been sustained in its suit.

Moreover, it was made clear in each case that the administrative agencies involved did not have authority to deal conclusively, if at all, with the matters before the Court: (1) in the *Alkali* case the agency's power to deal conclusively with the subject matter was questioned (325 U. S. 196, 205 and 210) and (2) in the *Borden* case (308 U. S. 188, 204-205) the agency's power to deal at all with the subject matter was questioned. In the latter case, the Court pointed out that the applicable administrative authority under the Capper-Volstead Act related to certain *"producers"* of agricultural products and their rights to combine with *each other,* and concluded that this did not cover "combination or conspiracy with *other persons* in restraint of trade". This was the situation also in *Hinton v. Columbia River Packers Ass'n.,* 131 F. 2d 88 (1942).

In other words, all of those cases were suits by the Government, and involved subject matter which was found to be outside of the authority conferred on the administrative agency involved: i.e., they were conspiracies and combinations which concerned persons and subject matter *over which the agency involved had no control* — and hence there *was no* administrative remedy to exhaust.

In the instant case, the suit is *not* at the instance of the Federal Government. In addition, not only are the parties and subject matter comprehended by the terms of the Federal Power Act, but the Federal Power Commission *has already acted* in an affirmative manner by approving the very contract here attacked, and ordering its refiling *in its entirety* as a tariff, subject only to a reduction in rates under an order which has been affirmed by the Court of Appeals for the Third Circuit, with certiorari denied by this Court.

The Safe Harbor 1931 contract has been on file with the Federal Power Commission practically since its inception. Since 1936, it has been on file as a tariff under the provisions of Section 205 of the Federal Power Act, 16 U. S. C. A., Sec. 824d, which provides in part as follows:

> "(c) Under such rules and regulations as the Commission may prescribe, *every public utility shall file* with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules *showing all rates and charges* for any transmission or sale subject to the jurisdiction of the Commission, and the *classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.*
>
> "(d) Unless the Commission otherwise orders, *no change shall be made* by any public utility *in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission* and the public * * *" (Emphasis supplied).

The two proceedings under which FPC has asserted control over Safe Harbor's services and rates under the Safe Harbor contract are described in Consolidated's answer herein, (R. 62-69). They need not be further described

here, other than to emphasize that the control asserted by FPC in 1944 was affirmed by the opinion of the United States Court of Appeals for the Third Circuit, *Safe Harbor Water Power Corporation v. Federal Power Commission,* 179 F. 2d 179 (1949) cert. den. 339 U. S. 957 (1950). That control went beyond a mere determination of rates. It was a determination of rates *for service under the 1931 contract* (described by the Third Circuit, in that case, as being "exemplary"), and the terms of service as established in that contract were approved by the FPC order requiring their refiling as a tariff, except for changes in rates.

One of the basic reasons for requiring exhaustion of administrative remedies before either a utility or its customers may attack a filed tariff in Court (no matter what the basis of the attack) is the assurance that the Court will then have before it not only the contentions of the parties, but the expert findings of the administrative body as to the real facts, and how the law should relate to them in the public interest. Penn Water, in this case, not only seeks to frustrate FPC orders, without the findings of that Commission being a matter of record before the Court, but in asking for a summary judgment seeks to preclude a complete presentation of evidence to the Court in support of the contentions of the parties. The decision of the Fourth Circuit, if permitted to stand, erroneously accomplishes just that result. Summary and unsupported as it is, it has become the basis of the attempt, in Nos. 428 and 429, to annul completely FPC rate orders based upon a factual record of over 25,000 pages.

We submit that the Fourth Circuit was without jurisdiction, and should have required Penn Water to exhaust its proper remedy for change of the tariff (the Safe Harbor contract) by proceedings before the Federal Power Commission, with appeal to the Courts therefrom.

II.

It was clear and reversible error for the Court of Appeals to affirm a summary judgment predicated upon conclusions of fact drawn by the District Court from plaintiff's allegations, but placed in issue by defendants' denials and averments fully supported by affidavits.

(Question 2)

A motion for summary judgment can be granted if, and only if, the pleadings, together with the affidavits, "*show* that there is no genuine issue as to *any* material fact and that the moving party is entitled to a judgment as a matter of law". F. R. C. P. Rule 56 (c); 3 Barron and Holtzhoff *Federal Practice and Procedure*, pp. 61-62, 69-71. The cases consistently hold that if there is the "slightest doubt" as to whether material facts are in dispute, summary judgment should not be granted.

In this proceeding, there are many genuine issues as to material fact which the District Court, in its Opinion granting the motion for summary judgment, implicitly or explicitly resolved in favor of Penn Water, contrary to Rule 56(c). Allegations contained in at least eighty-six separately numbered paragraphs of the complaint were denied by the answer of Consolidated (R. 36) and by the separate answer of the Maryland Commission (R. 177). Substantially all of these allegations are wholly or partially factual, and presumably they were deemed by Penn Water to be material to its case. It is obvious that at least some of them are material. It was not within the province of the Court to resolve them peremptorily upon motion for summary judgment by a *tour de force* conclusion stated at the very outset of its Opinion (R. 3):

> "* * * The instant or 3-party contract of June 1, 1931, designs a restraint violative of the Sherman Act, 15 USCA 1 et seq., and in the process breaks the

> Pennsylvania Laws *by reducing Safe Harbor Water Power Corporation from a public utility to an impotent agency of the other parties.* This conclusion is reached from an examination of the agreement in the light of the following indisputable and environing facts: that generation of electricity for wholesale is the business of each of the parties; that the geographical and relative location of their generating plants, of Penn's and Consolidated's transmission lines and inter-connection, and of the territory and patrons served by all of them, are as shown upon the map now in the record; and that the 2-party agreement, Safe Harbor's corporate papers, its certificate of convenience, the orders of the Pennsylvania Utility Commission thereon, and the pertinent statutes of that State, are as pleaded."

The italicized phrase in this very statement resolves a disputed issue of fact in favor of Penn Water. It is a complete and summary determination of fact — i.e., whether or not Safe Harbor has acted throughout the years under the independent management and control of its own Board of Directors. The same determination of undisputed fact, along with another regarding control exercised through the Operating Committee, appears later in the District Court's Opinion in greater detail (R. 8):

> "The aim of the 3-party agreement is to place the internal control of Safe Harbor in the hands of Penn Water and Consolidated. It does so not only by the restrictions of Articles III and IV but also through the Operating Committee established by Article XIV. This Article constitutes the Committee as both advisory and regulatory of Safe Harbor. The board of directors of Safe Harbor are deposed from their place of guidance and responsibility. In few, the contract destroys the corporate virility of Safe Harbor and subjugates it as a mandate of Penn Water and Consolidated, depriving Safe Harbor of the discretion and initiative

necessary to respond and be alive to its public obligations. This is intolerable under the common law and statutes of the State of Pennsylvania."

All of this was denied by the answers of Consolidated and the Maryland Commission, and by brief and argument. It is likewise refuted by the affidavit of Ralph L. Thomas (R. 152-153).

Other portions of the Opinion contain equally patent determinations of disputed issues of material fact by the Court. On the issue of potential competition, the Court said, in part (R. 3):

> " * * * That the third party, Safe Harbor, is also a latent competitor is manifest from the location of its plant in reference to Penn Water's, from the easy deliverability of its power to the customers of Consolidated, notably in the Washington area, as well as to the patrons of Penn Water, albeit at present needing the transmission lines of the latter for such purposes. * * *"

This language involves a latent determination contrary to the factual contentions of Consolidated's answer, Pars. 11, 45, 46, 47, 61 (R. 39-47, 55-57, 60) and Mr. Thomas' affidavit (R. 124-149, 152-153) that Safe Harbor sold and sells its entire output two-thirds to Consolidated and one-third to Penn Water; and furthermore, that from the beginning of the contract term, and even now, there would be no foreseeable possibility of expanding the generating capacity of the plant beyond the seven wheels originally contemplated. These later contentions emphasize that the erection of the Safe Harbor plant was not for the purpose of stifling competition. The agreement was not, and is not, a contract in restraint of trade and commerce. It is a valid contract which fosters trade and commerce.

The District Court, further on in its Opinion (R. 4) states: "As will be evident upon their discussion, the play of the restrictive covenants in the 3-party agreement reveals this contract as a futherance of the 2-party plan, extending the 2-party circumscription to the source of the Safe Harbor energy"; and still further (R. 8): "Study of the 3-party contract convinces the Court that the objectionable provisions cannot be severed from the whole; that the agreement is entire and indivisible, its covenants dependent; and that the restrictive terms are of the warp and weft of the agreement and, if taken out, the residual could not be said to represent the agreement of the parties". Again, these statements involve conclusions of fact directly contrary to: (1) the answer of Consolidated, Pars. 38 and 69 (R. 52, 61); (2) the answer of the Maryland Commission, Pars. 27, 45 (R. 180, 183); and (3) the affidavit of Mr. Thomas (R. 153-155).

Finally, the District Court draws this conclusion (R. 7-8): "The agreement in suit as plainly transgresses the laws of the State of Pennsylvania as did the 2-party contract in the Penn Water case, * * * Judge Soper's discussion of this subject fully and featly disposes of it". This conclusion clearly contains several latent determinations of fact contrary to the contentions of Consolidated, the Maryland Commission, and the affidavit of Mr. Thomas, particularly in the latent assumption that Safe Harbor in fact has business which is subject to the jurisdiction of the Pennsylvania Commission. Petitioners' position was and is that Safe Harbor sells its entire output in interstate commerce, two-thirds to Consolidated and one-third to Penn Water, and has no intrastate sales (R. 39-47, 139-140, 182-183).

This position is supported by the recent decisions of the United States Court of Appeals for the District of Columbia

in *Pennsylvania Water & Power Company, et al. v. F. P. C.*, et al., *supra*, and of the three-judge United States District Court for the Middle District of Pennsylvania, *Consolidated Gas Electric Light and Power Company, et al. v. Siggins, et al., supra*, which issued a permanent injunction against the Pennsylvania Commission's assertions of rate jurisdiction over Safe Harbor, because all of the latter's sales are in interstate commerce, two-thirds to Consolidated and one-third to Penn Water, as found by FPC. All parties to the present case were parties to each of those proceedings, and are bound by the judgments rendered therein. Restatement of Judgments, Sec. 1, 68; Restatement, Conflict of Laws, Sec. 450.

The Fourth Circuit, in affirming this summary determination, offers no justification for the patent breach of the rules related to summary judgment. It merely states its conclusion that:

> 'The contract between the three utility companies, now before us, which for convenience may be called the Safe Harbor Contract, also contains unlawful restrictions and conditions; and this appears so clearly from the provisions of the basic document and from its close connection with the contemporary invalid Penn Water Contract as to have little room for discussion" (R. 233) and "it follows as a matter of course that the three party agreement in suit must fall for the reasons set out in our earlier opinion for the invalidation of the companion contract. It is an integral part of an illegal plan which violates the federal anti-trust statutes and the public service laws of the State of Pennsylvania" (R. 237).

The basic fault of these conclusions is that they result in a *summary* condemnation of the Safe Harbor contract as being part of a far-reaching conspiracy in restraint of trade, on the assumption that there was such a finding of con-

spiracy in the Penn Water contract case. But that proceeding involved no such factual determination (it was not brought to enjoin a conspiracy), and the Fourth Circuit explicitly disavowed consideration of evidence related thereto, saying:

> "Since we reach the conclusion that the agreement is *invalid on its face,* we have not found it necessary to consider certain excluded evidence offered by Penn Water which tended to show that the purpose and effect of the agreement was to bring about an unlawful restraint of trade." (184 F. 2d 552, 560 n. 4).

In Note 8 of the Penn Water contract case Opinion (184 F. 2d 552, 564), the Fourth Circuit said:

> "Even if it should be held that the Federal Power Act requires a preliminary determination by the Federal Power Commission in order to clothe a District Court with jurisdiction to entertain a suit to revoke a license or enjoin an act of a utility in violation of the anti-trust acts, it would not necessarily follow that such a determination is necessary to give jurisdiction to the District Court in a case of this kind. The instant suit was not brought to enforce the anti-trust acts. * * *"

There was no evidence accepted in that case (and obviously none in this one) to support a finding of "conspiracy in restraint of trade" or "illegal plan," such as now becomes the basis of condemnation of the Safe Harbor contract. Those issues were not in either case. As stated in the opinion below, the Penn Water contract was condemned "on its face" only "because Articles IV and V of the basic agreement of June 1, 1931 conferred upon Consolidated the power to control: (1) the prices at which Penn Water might sell its product; (2) the extent to which Penn Water might extend its plant; (3) the territory in which Penn Water

might sell its product; and (4) the amount of backfeed energy which Penn Water must purchase from Consolidated" (R. 233). The Safe Harbor contract contains no counterpart of these Articles included in the Penn Water contract, nor anything that resembles the far-reaching effect which the Fourth Circuit ascribes to them in its Penn Water opinion.

It is respectfully submitted that there is no legal justification for the *summary* condemnation of a contract of such far-reaching importance as herein involved, which has been praised as "exemplary" by the Court of Appeals for the Third Circuit (*Safe Harbor Water Power Corporation v. FPC, supra*), which has been prescribed as a tariff by FPC and confirmed as such by the Third Circuit in the above case, which contains neither of the provisions made the basis of illegality of the Penn Water contract, and which could operate (and has operated) to accomplish its basic purposes without the inclusion of provisions designated as illegal in the opinions below.

III.

The Court of Appeals Committed Serious and Reversible Error in Finding that the Safe Harbor Contract Violates the Sherman Act and the Laws and Public Policy of Pennsylvania, Relying Only Upon Its Own Earlier Decision in the Penn Water Contract Case, and Giving the Parties No Opportunity to Show the Many Differences in Fact Between the Two Cases.

(Questions 3-6)

The Sherman Act — on the facts, the "rule of reason" sustains the contract.

That the District Court erroneously considered itself completely bound by the Penn Water contract decision is

apparent throughout its memorandum opinion (R. 3-9). In the opening sentences of its opinion, the District Court stated, "Pattern for decision here is *prescribed* by *Pennsylvania Water & Power Co. v. Consolidated Gas Electric Light and Power Co.*" Six times in its opinion the Court explicitly relied on the supposedly controlling effect in the instant case of the Penn Water contract decision, although the many differences between the Safe Harbor contract and the Penn Water contract were not before the Fourth Circuit in that case.

The Penn Water contract was invalidated on the basis of the facts as found in that case, and the presence in it of two Articles (IV and V) which do not appear in the Safe Harbor contract. Among the material facts there found were preexisting competition between Penn Water and Consolidated in the latter's service area; sales by Penn Water to Metropolitan Edison, Pennsylvania Power and Light, and Philadelphia Electric Company, in Pennsylvania both before and after the execution of the Penn Water contract, and the receipt of most of Penn Water's revenues from those customers; charter and franchise rights of Penn Water and its subsidiary to sell to the public in Pennsylvania and Maryland both at wholesale and at retail; ownership by Penn Water and its subsidiary of a large interstate transmission system; absence of corporate relationship between Penn Water and Consolidated; ownership of both hydro and steam plants by Penn Water and feasibility of expanding the latter; and Penn Water's purchase of steam-generated "backfeed" from its three Pennsylvania customers and from Consolidated, (summarized from the Fourth Circuit's opinion, 184 F. 2d 552).

Not one of those facts, or comparable facts, are found in the instant case. Nevertheless, the Fourth Circuit affirmed

the summary judgment herein, predicating its opinion in part upon the summary of facts in its earlier opinion in the Penn Water contract case, and stating that "the Safe Harbor contract also contains unlawful restrictions and conditions; and this appears so clearly from the provisions of the basic document and from its close connection with the contemporary invalid Penn Water contract as to leave little room for discussion." (Opinion p. 4, R. 233). This summary conclusion is flatly contrary to the facts and the law as properly applied thereto.

Safe Harbor did not begin commercial operations until nine months after the execution of the Safe Harbor contract; the sale of its entire output for a long term was essential to its initial financing; after unsuccessful efforts by Penn Water to sell Safe Harbor's output to Philadelphia Electric Company and Pennsylvania Power and Light Company, Consolidated was called on to advance $9,600,000 to Safe Harbor on unsecured notes, to purchase ⅔ of Safe Harbor's output until 1980, to purchase ⅔ of its capital stock for $6,000,000, and to guarantee its entire $21,000,000 bond issue (taking an indemnity from Penn Water as to ⅓ of this latter liability). For these outlays of cash and future obligations Consolidated received only ½ of Safe Harbor's voting stock (R. 48-51). Even Penn Water's complaint (Par. 61, R. 17) avers that Consolidated was so "directed to participate". The control exercised by Penn Water over Consolidated, as claimed in the Walls letter quoted in the Greer Affidavit (R. 118) made such "direction" effective.

Safe Harbor has always sold its entire output ⅔ to Consolidated and ⅓ to Penn Water, and has always received its entire revenue from those companies in the same proportion. This fact has been established by the Third Cir-

cuit, the District of Columbia Circuit, and the Middle District of Pennsylvania in proceedings which are *res adjudicata* as to these facts (R. 39-47; 182-183; 139-140). Safe Harbor has no charter power to generate, sell, or buy steam-generated electricity. It has no charter rights outside of two small townships in Pennsylvania, no franchise rights whatsoever, no subsidiaries, no transmission lines, and has been forbidden by the Pennsylvania Public Utility Commission to sell electricity to the public at retail (R. 39; 164-171). Safe Harbor has never bought any power "backfeed" and has no need therefor, since it sells only its fluctuating run-of-river output to its two owners. There is no practicable possibility of the expansion of Safe Harbor's hydro plant (R. 56, 140-146).

The Penn Water contract was a "residual" type contract under which Consolidated had an open-end obligation to pay Penn Water its operating costs and a substantial return on Penn Water's plant, including any and all additions, without limitation, plus an open-end obligation to buy whatever power was left over after Penn Water's sales to its other customers. Consequently, the controls in that contract were made broad enough to protect Consolidated in this heavy liability. The Safe Harbor contract is not of the "residual" type. It is for the sale of specific shares (⅔ and ⅓) of a specific amount of capacity ("approximately 255,000 horsepower") and energy ("850,000,000 kwh average annual energy").

In the Penn Water contract case, the Fourth Circuit found that the restrictions in the Penn Water contract which rendered it invalid were contained in its Article IV and V. Neither of these Articles appears in the Safe Harbor contract, nor do any provisions in the latter have the same effect. Only three Articles (III(a), IV, XIV) are challenged.

The first, Article III(a) (R. 95) is not a "restriction" on Safe Harbor but an obligation *to install additional machinery or equipment,* over and above the initial development "at the request and for the benefit" of *either* Consolidated or Penn Water, and not otherwise incumbent on it. The language is affirmative, "* * * Safe Harbor Company *shall* install * * *." This additional *obligation to expand* in no wise affects Safe Harbor's unrestricted power or duty to initiate its own expansions (assuming their economic feasibility) in the absence of such an individual request from either of its two owners. This additional obligation to expand on such individual request is conditioned on the receipt by Safe Harbor, from the party making the request, of 18 months' notice before the facilities are to be completed, and the other owner's approval of an installation of additional machinery or equipment for the sole benefit of only the applicant owner. Such expansion obligation is also subject to the condition that the owner so requesting the expansion for its sole benefit shall guarantee Safe Harbor the operating expenses and return on such additional installation. This provision is assuredly a far cry from Article V of the Penn Water contract.

This same paragraph provides that as to other additions to the hydro plant, which would be made at the joint expense of the two owners, Safe Harbor will not sell its output to any other customer than its two owners (who would finance the expansion) without their consent. As noted elsewhere, all of the engineers, both Penn Water's and Consolidated's, agree that such expansion is not foreseeable (R. 141). The sale of its output is likewise not foreseeable and so is not "potential." But even if it were—wherein is competition in any way affected? This is merely an option of its two owners to purchase the output of plant additions (again assuming their feasibility). If it is proper for Safe

Harbor to sell the entire output of its plant to its two owners, as has been held by several Courts, wherein lies the vice of giving to them a similar option on the output of plant additions which they will likewise finance? If such expansion should ever occur, the two owners, to the extent regulatory laws will permit, will be in direct competition with each other (and with other utilities) in the disposition of their respective shares of the expanded output.

Article IV, "Coordination and Joint Use of Facilities," (R. 96) seeks to prevent wasteful duplication of investment and operating costs; to foster economic interchange and coordinated utilization of facilities. After a lengthy recital of such purpose, it concludes, "*For this purpose* Safe Harbor Company will not enter into other agreements with either receiving company (i.e., Penn Water or Consolidated) without the approval of the other and will take into consideration either receiving company's suggestions for the best coordinated utilization of all facilities that may be mutually beneficial". This simply forbids and is limited to any "side agreements" which would have the effect of creating wasteful duplication of investment or operating costs, or of preventing economy interchange or coordinated utilization of facilities. Such a provision is definitely in the public interest, entered into not for the purpose of restraining trade, but as part of an agreement designed to foster trade.

The final alleged restraint is under Article XIV (R. 105), which provides for an operating committee "for investigation, consultation and advice." It is given no other authority. In twenty years of operation under this contract, Safe Harbor has never been directed, requested, or ordered by the Operating Committee to take any action or refrain from any action. The only action alleged by Penn Water to have been taken by Safe Harbor under this Article was

taken by that Company only after consultation with and approval of its President and Board of Directors, involving an expenditure by Safe Harbor of only $3,000 (R. 147-148; 152-155).

These provisions have no similarity to Articles IV and V of the Penn Water contract. There is no restriction in the Safe Harbor contract as to prices, such as was held to be illegal "per se" in the Penn Water case and to eliminate application of the "rule of reason". There is here no restriction upon Safe Harbor to act upon its own initiative, and in pursuance of its charter rights to install additional generation or other equipment if it finds it desirable or necessary to do so in pursuance of its powers and duties.

For over twenty years there has never been any occasion to resort to the above described Articles in the Safe Harbor contract which have nevertheless been made the basis of its destruction (R. 147-148; 152-153). Penn Water's and Consolidated's engineers agree that the present Safe Harbor plant can utilize the entire average river flow for 312 days out of the year. It is not economically practicable to add an expensive generator that would necessarily remain idle over ten months each year. Consequently, there is no practical possibility of the claimed restraints ever becoming operative or of any significance (R. 140-146; 154).

Under these circumstances and considering the above-reviewed clear differences between the Safe Harbor and Penn Water situations, there is no rational justification for the Fourth Circuit to condemn summarily the Safe Harbor contract as being a *per se* violation of the Sherman Act. Through the Safe Harbor contract, Consolidated and Penn Water, brought into existence a new hydro plant, accomplishing a vertical integration by contract (and stock ownership) subject to the condemnation of the Sherman

Act only if it violated the "rule of reason" (*U. S. v. Terminal R. R. Association of St. Louis,* 224 U. S. 383 (1912); *Standard Oil Co. (Indiana) v. U. S.,* 283 U. S. 163 (1931); *Appalachian Coals, Inc. v. U. S.,* 288 U. S. 344 (1933); *Associated Press v. U. S.,* 326 U. S. 1 (1945); *U. S. v. Paramount Pictures,* 334 U. S. 131, 173-4 (1948); *U. S. v. Columbia Steel Co.,* 334 U. S. 495 (1948); and *U. S. v. Yellow Cab Co.,* 332 U. S. 218 (1947), 338 U. S. 338 (1949). No such violation has occurred or can be shown.

The Pennsylvania Law and Public Policy do not Apply to this Completely Interstate Situation.

The District Court was equally in error in its conclusion that the Safe Harbor contract "as plainly transgresses the laws of the State of Pennsylvania as did the two-party contract in the Penn Water case, * * * Judge Soper's discussion of this subject fully and featly disposes of it" (R. 7, 8), which conclusion was affirmed without discussion in the Fourth Circuit's opinion. In arriving at this conclusion the Court resolved sharply disputed issues of material fact which were not (and could not) have been settled by the prior case, particularly as related to whether or not *Safe Harbor* has any intrastate business subject to the jurisdiction of the Pennsylvania Commission.

The Fourth Circuit's opinion in the Penn Water contract case, resolved the issue that State jurisdiction was lacking by stating "that *Penn Water* is engaged in the production and local distribution of electrical energy to local utilities which distribute power to consumers in Pennsylvania, and in respect to this business, it seems clear that the state commission possesses regulatory power" (184 F. 2d 552, 568; emphasis supplied). This conclusion, with reference to the nature of *Penn Water's* business and the consequent jurisdic-

tion of the Pennsylvania Commission, is clearly contrary to the findings of the Federal Power Commission and the decision of the United States Court of Appeals for the District of Columbia Circuit, affirming that Commission's order made upon a full record (.... Fed. 2d ...., July 3, 1951, before this Court in Nos. 428 and 429).

However, assuming the statement is valid as to *Penn Water*, there is no doubt whatsoever that it cannot be carried over to *Safe Harbor's* situation in the instant proceeding. Petitioners contended below that Safe Harbor makes no intrastate sales subject to the jurisdiction of the Pennsylvania Commission and submitted affidavits in support thereof (R. 39-47, 139-140, 182-183). This clearly established a dispute as to material fact relating to the asserted violation of the Pennsylvania law, and public policy, which could not properly be resolved on motion for summary judgment contrary to these Petitioners' contentions.

Furthermore, the lack of jurisdiction of the Pennsylvania Commission over any of Safe Harbor's sales or services would seem to be established by several decisions involving Safe Harbor, to which the Pennsylvania Commission has been party.

Safe Harbor Water Power Corp. v. F. P. C., 179 F. 2d 179 (1949) cert. den. 339 U. S. 957 (1950);

Pennsylvania Water & Power Company, et. al. v. F. P. C., et al., ... F. 2d .... (July 3, 1951) Cert. granted Feb. 4, 1952, October Term 1951, Nos. 428, 429;

Consolidated Gas Electric Light and Power Company of Baltimore et al. v. Siggins, et al., 99 Fed. Supp. 151 (Aug. 7, 1951) — enjoining the Pennsylvania Commission from exercising jurisdiction over Safe Harbor, with no appeal taken.

We believe that the Pennsylvania Commission is bound by those determinations and that the Fourth Circuit committed clear error in not giving them (particularly the latter) their full effect under doctrines of *res judicata*. In any event, however, there is a conflict of circuits as to whether Safe Harbor is in any respect subject to the control of the Pennsylvania Commission.

IV.

There Was Clear Error in Affirming a Summary Declaratory Judgment Striking Down the Entire Safe Harbor Agreement, When the Record Shows that the Only Provisions Found to Be Objectionable Had Been Inoperative and Were Separable.

(Question 7)

The District Court, selecting language from a single case which is obviously not in point on its facts (*U. S. v. Bethlehem Steel Corp.*, 315 U. S. 289, 298), determined that the Safe Harbor contract is inseparable, its covenants dependent, and the restrictions "of the warp and weft" (R. 8). This sweeping conclusion was reached without accepting any evidence whatsoever related to such determination, and despite the fact that Consolidated had put in issue the fact of separability (Answer Par. 70F, R. 62), supported by the affidavit of Mr. Ralph L. Thomas, Vice-President and Executive Engineer of Consolidated, former General Superintendent of Penn Water, and Project Engineer of Safe Harbor from 1930 until 1942. Mr. Thomas deposed (R. 153-155):

> "Operation of the Safe Harbor plant is entirely practicable and feasible under the Safe Harbor contract alone. Such operation in the public interest is not dependent on the existence or non-existence of contracts between Penn Water and Consolidated with respect

to the sale of the output or the operation of Penn Water's plant at Holtwood.

"* * *

"* * * Because of the present high utilization of river flow by Safe Harbor and of Consolidated's interest only in its two-third share of the output of the present plant, the provisions of Article III(a) of the Safe Harbor Agreement are academic, have never been the subject of any differences or been of any significance, and could be eliminated from the Contract without any effect whatsoever on the practicable and feasible performance in the public interest of the balance of the Contract entirely free of any restraints whatsoever. The same statement applies to the last sentence in Article IV of the Contract if Penn Water objects to that."

Without one word of justification in its opinion, the Fourth Circuit affirmed the District Court in rejecting the argument of separability. Such action is not only contrary to long standing principles of contract law, but also flatly ignores the rule that summary judgment may issue only where there is no disputed issue of material fact.

The Maryland Commission calls attention to these hard, practical facts. The features of the contract found objectionable by the District Court, with the exception of the Operating Committee, have not influenced *one* kwh of electric energy in twenty years (Thomas Affidavit R. 153-155, quoted above). Nothing has taken place in twenty years which has caused these provisions to become operative. They did not influence the installation of the seventh generating unit in 1940, because the parties were committed to that in 1931. On the other hand, the remainder of the agreement has independently governed the *complete* production, sale and delivery of over 16 *billion* kwh of electric energy. It is therefore fantastic to describe the so-called

objectionable features as the "warp and weft" of the entire contract.

Consolidated is, in fact, only a stake-holder in this case. If it loses its inexpensive Safe Harbor power, it must replace it with such more expensive steam-generated power. The higher cost, as one of Consolidated's allowable operating expenses, would necessarily be passed on to the Maryland public. The avoidance of such an unjustifiable burden on Maryland consumers is the principal concern of the Maryland Commission. We submit that the prospect of higher electric rates for a half-million Maryland rate payers should be of real concern to this Court, particularly in view of the several findings of the Federal Power Commission, the United States District Court for the Middle District of Pennsylvania (99 Fed. Supp. 151), the United States Court of Appeals for the Third Circuit (179 F. 2d 179), and the United States Court of Appeals for the District of Columbia (.... F. 2d ...., before this Court in Nos. 428 and 429), in consistently sustaining Consolidated's claim to two-thirds of the entire economical output of the existing Safe Harbor plant — and after protracted hearings and arguments on detailed and voluminous factual records.

Penn Water's insistence upon striking down the entire Safe Harbor contract stands out starkly as a bold attempt to free for itself a larger share of Safe Harbor power, and also to secure a further basis for attacking the recent Federal Power Commission orders which reduced Safe Harbor's and Penn Water's hydro rates for the ultimate benefit of both the Maryland and Pennsylvania consuming public.

Whatever justification there might be (and we submit there is none) for striking down the provisions of the Safe Harbor contract found to be objectionable by the Courts

below, there was no justification whatsoever for refusing to separate them from the remainder of the contract in which no illegality has been, or can be, found.

In condemning the entire Safe Harbor contract, the Fourth Circuit has acted contrary to well-established law relating to separability of invalid provisions of contracts, including its own decision in *Paramount Famous Lasky Corp. v. National Theatre Corp.*, 49 F. 2d 64, 66 (1931), in which the Fourth Circuit stated, in part:

> "It has been expressly held that, where agreements in restraint of trade were unlawful in part, they were enforceable as to the parts that were not unlawful, and this holding runs back to the earliest authorities."

And see: *American Railway Express Co. v. Lindenberg*, 260 U. S. 584, 585 (1923); Oregon Steam Navigation Co. *v. Winsor*, 87 U. S. 64 (1873); *Western Union Tel. Co. v. Pennsylvania Co.*, 129 Fed. 849, 868 (CCA 3, 1904).

Williston on Contracts (Rev. Ed.) Sec. 1629A, p. 4459 (see also Sec. 1659) correctly summarizes the rule:

> "Thus the courts enforce the severable legal parts of an illegal divisible contract where the unlawfulness does not permeate the whole and even in the case of indivisible contracts they strive to segregate and uphold if possible such portions as may be legal."

CONCLUSION

In summary, the real question is whether this Court will permit the Fourth Circuit to uphold a collateral attack upon an FPC tariff, and in doing so, to deny Maryland its benefit from Consolidated's share in the output of the present Safe Harbor plant, by striking down Consolidated's contractual entitlement thereto without even a factual record before it.

WHEREFORE, it is respectfully submitted that the petition should be granted.

Charles D. Harris

CHARLES D. HARRIS,

General Counsel,
Public Service Commission
of Maryland.

Baltimore, Maryland,
February 23, 1952.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

Nos. 611 and 612.

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE and PUBLIC SERVICE COMMISSION OF MARYLAND,

Petitioners,

v.

PENNSYLVANIA WATER & POWER COMPANY and PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF RESPONDENT PENNSYLVANIA WATER & POWER COMPANY IN OPPOSITION.

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IN THE

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OCTOBER TERM, 1951.

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CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE and PUBLIC SERVICE COMMISSION OF MARYLAND,
Petitioners,

v.

PENNSYLVANIA WATER & POWER COMPANY and PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF RESPONDENT PENNSYLVANIA WATER & POWER COMPANY IN OPPOSITION.

Statement.

The petitions of Consolidated Gas Electric Light and Power Company of Baltimore (Consolidated) and the Maryland Commission and the Memorandum of the Federal Power Commission (FPC) as *amicus curiae* in support of these petitions present no sound ground for the review by this Court of the decision of the Fourth Circuit holding illegal the contract (Safe Harbor contract) for the sale of power by Safe Harbor Water Power Corporation (Safe Harbor), a Pennsylvania corporation, to Consolidated (a Maryland corporation) and respondent Pennsylvania Water

& Power Company (Penn Water), a Pennsylvania corporation (Printed Record in this case (R., pp. 231-250)). The petitions seek a review of a decision which was simply a sequel to and followed in all material respects an earlier decision of the Fourth Circuit holding illegal the substantially identical contract (Baltimore contract) for the sale of power by Penn Water to Consolidated, as to which earlier decision this Court denied certiorari.*

The only issue in the Safe Harbor contract case which was not before this Court when it denied certiorari in the Baltimore contract case is whether the Safe Harbor contract is substantially identical with the Baltimore contract. Both the District Court for the District of Maryland and the Fourth Circuit (unanimously) decided that it was so substantially similar as to present an appropriate case for summary judgment. Counsel for Consolidated itself had asserted on the record in the Baltimore contract case that the two contracts were substantially identical (R., p. 52).** This new issue is certainly not a matter of general Federal law or public interest meriting a second review or the attention of this Court.

In each contract case the Fourth Circuit adjudged the contract illegal *per se* and void in its entirety, as in violation of the Federal antitrust laws, the corporation and utility statutes of Pennsylvania and common law and public policy. The Fourth Circuit held in each case that the contract surrendered control of the seller to Consolidated

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* *Pennsylvania Water & Power Co., Pennsylvania Public Utility Commission* v. *Consolidated Gas Electric Light and Power Company of Baltimore, Public Service Commission of Maryland,* 184 F. 2d 552 (1950), cert. den. 340 U. S. 906 (1950).

** It was necessary for Penn Water to bring this case only because, following denial of certiorari in the Baltimore contract case, Consolidated retracted its previous concession that the contracts were substantially identical and refused to concede that the Safe Harbor contract was similarly illegal.

and stifled the seller's initiative with respect to rates, services, operating economies and new business, and destroyed its independent corporate character as a Pennsylvania corporation. The Fourth Circuit held each contract to be violative of the fundamental, organic law of Pennsylvania, common law and public policy, and not a mere violation of some regulation imposed by Pennsylvania or its Public Utility Commission.

The Fourth Circuit held that Penn Water, Safe Harbor and Consolidated, except for the illegal contract, would be in potential competition in the generation, transmission and sale of electric energy at wholesale.*

The Court held each contract contained *per se* illegal restraints giving control to Consolidated over the seller's contracts, sales, prices, territories, markets, output and expansion.

Not only did each contract, by its express terms, give Consolidated these restrictive control powers over the seller, but the specified return method of payment provided for effectively prevented competition by stifling all incentive of the seller to compete, obtain new business or

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* Penn Water is a Pennsylvania electric utility corporation with hydro and steam electric generating plants at Holtwood, Pennsylvania on the Susquehanna River, with transmission lines connecting with Safe Harbor, Pennsylvania Power & Light Company, Philadelphia Electric Company and Metropolitan Edison Company in Pennsylvania, and through a wholly owned subsidiary with Consolidated and Potomac Electric Power Company in Maryland.

Safe Harbor is a Pennsylvania electric utility corporation owning a hydroelectric generating plant at Safe Harbor, just above Holtwood, on the Susquehanna River.

Consolidated is a Maryland electric utility corporation with steam electric generating, transmission and distribution facilities in and around Baltimore, Maryland. Consolidated has generating capacity several times that of Penn Water or Safe Harbor, and its gross assets are also several times larger than those of either Penn Water or Safe Harbor.

effect operating economies. Under each contract the seller was to be paid for power not on the customary basis of a rate specified in advance per unit of capacity and energy actually furnished, but, regardless of the amount of power delivered, on the unusual basis of annual payments equal to all of the seller's operating expenses, including taxes, and a specified percentage return on plant investment, with a credit for revenues received by the seller from sales of power to others made with Consolidated's approval.

The Safe Harbor contract, entered into on the same date as the basic agreement of the Baltimore contract, was substantially similar to the Baltimore contract, except that Safe Harbor's power not sold to others under contracts approved by Consolidated and Penn Water was to be sold two-thirds to Consolidated and one-third to Penn Water (instead of all to Consolidated), and Consolidated and Penn Water divided the residual payments to be made to Safe Harbor therefor on a two-thirds—one-third basis.* While "Chinese copies" of the restrictive provisions contained in the Baltimore contract are not in all instances found under the same article numbers in the Safe Harbor contract, provisions to the same effect are contained in the Safe Harbor contract and, in fact, some of the provisions are "Chinese copies" of the Baltimore contract provisions.**

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* The Baltimore contract consisted of three agreements dated December 31, 1927, June 1, 1931 and September 29, 1939 (Tr., pp. 62-84, 87-102). The Safe Harbor contract consisted of three agreements dated June 1, 1931, August 1, 1932 and November 22, 1939 (R., pp. 91-112). In the case of each contract the basic agreement was the one dated June 1, 1931.

** For example, (a) the payment provision of Article III of the Baltimore contract is found in Article V of the Safe Harbor contract and (b) the provisions for an Operating Committee, giving Consolidated a veto over managerial decisions of the seller, are found in Article VIII of the Baltimore contract and in Articles IV and XIV of the Safe Harbor contract.

Counsel for Consolidated stated in the District Court in the Baltimore contract case (R., p. 52): "the [Safe Harbor] contract is substantially the same [as the Baltimore contract]. * * * It is almost identical language." And in its brief in the Fourth Circuit in the Baltimore contract case Consolidated stated (p. 34) that the Safe Harbor contract was a "sister contract" to the Baltimore contract "executed simultaneously" therewith, and (p. 35) "the Basic Agreement [the Baltimore contract] and the supplementary agreement with Safe Harbor [Safe Harbor contract] are in essence an energy sales contract".

The Baltimore and Safe Harbor contracts were made for a term of fifty years at a time (June 1, 1931) when Penn Water, Safe Harbor and Consolidated were under the common control of J. E. Aldred and associates, which control began in 1910 and extended at least through 1946 (Fourth Circuit decision, 184 F. 2d 552, 557 (1950)). The contracts were leftovers from the era of private banking house and holding company control of utilities. As the Fourth Circuit said with respect to the contracts:

> "These restrictions which tied the parties together and stifled individual initiative for the period of fifty years were made to promote the advantage of the persons in control and not primarily in the interest of the public" (R., p. 243).

Consolidated injected into the Baltimore contract case (for the first time on appeal) the claim that the FPC had authority to exempt the contract from the antitrust laws and had done so, and that the courts were ousted from jurisdiction to enforce those laws by the Federal Power Act. The Fourth Circuit rejected the contention and pointed out the complete absence from the Federal Power Act of any provision therefor such as is contained in some other

Federal regulatory statutes. The same claim was made in the Safe Harbor contract case and again rejected.

The same contention was presented in the petitions for certiorari in the Baltimore contract case, which this Court denied, and now once again is put forward in the present petitions. Penn Water's reply to the petitions in the Baltimore contract case pointed out that there was no issue in that case warranting review by this Court. Penn Water also pointed out, however, that there was another issue which this Court might have to decide, and which could only be decided in a case reviewing FPC orders, not in a case, such as the Baltimore contract case, where no FPC orders were on review. That other issue was the effect of the contract illegalities on FPC orders (then under review in the D. C. Circuit) based on and directing continuance of contractual arrangements which the Fourth Circuit had held illegal.

When such FPC orders had been reviewed by the D. C. Circuit, Penn Water reiterated its position that such issue should be decided by this Court, and this Court granted certiorari. That case (Nos. 428 and 429) is now in this Court on the merits, set for argument April 3, 1952.

Just as the issue regarding the effect of the illegality of the Baltimore contract on the FPC orders against Penn Water should be determined by this Court in the case reviewing such orders, so also the issue regarding the effect on such orders of the illegalities of the Safe Harbor contract should be determined there. That issue cannot be determined in the present case, in which no FPC orders are on review.

It is obvious from the petitions herein that the petitioners wish to argue before this Court in briefs and orally the *minutiae* of their contentions that the two contracts

are not substantially identical, notwithstanding their previous concessions to the contrary. The petitioners have had their "day in court" on that issue, with a full review by an appellate court. These *minutiae* were argued in the District Court for three hours on one day and eight hours on another, and for three hours before the Fourth Circuit. The petitioners are not entitled to a further review of this essentially private question, which is not one of general Federal law or public interest meriting the attention of this Court.

Consolidated and the Maryland Commission also want to contest before this Court the Fourth Circuit's entirely orthodox application of the antitrust law decisions of this Court to the Safe Harbor contract. However, Government counsel for the FPC in their Memorandum as *amicus* (which was also a motion joined in by counsel for the Maryland Commission), after referring to FPC orders which purported to exempt the illegal contract from the antitrust laws, frankly admit (p. 3) that the contract, "as an agreement between the parties, would otherwise violate the Sherman Act." It is not believed that this Court will want to review this orthodox antitrust decision regarding the Safe Harbor contract any more than it did the similar decision on the Baltimore contract, as to which it denied certiorari.*

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* The FPC's seven-page Memorandum contains no real argument as to why the petitions should be granted but simply a claim that there is one difference between the two Fourth Circuit cases which justified denying certiorari in the Baltimore contract case but warrants the granting of certiorari here. The asserted difference is that the FPC orders issued in 1949 approving and ordering continuance of the Baltimore contract excepted any provisions thereof which might later be held to be unlawful by some court in some other case, whereas other FPC orders prescribed the entire Safe Harbor contract, including any provisions thereof which might be found to be unlawful. The petitions for certiorari in the Baltimore contract case did not present that case to this Court with any such claimed

The petitioners contend that there are other issues involved, but such points are also without substance. For example: The petitioners contend that the restrictive provisions in the Safe Harbor contract are separable, although they strenuously maintained that the similar provisions of the Baltimore contract were inseparable; and they contend that the validity or invalidity of the Safe Harbor contract should not have been decided on the face of the papers, although they contended that the validity or invalidity of the Baltimore contract must be so determined and objected to the introduction of any evidence in the Baltimore contract case.

Reasons for Denying the Writ.

1. There is no merit in the contention that the writ should be granted because the decision below allegedly conflicts with decisions of the District of Columbia Circuit, the Third Circuit and the Middle District of Pennsylvania.

(a) The District of Columbia Circuit decision.

Petitioners contend that the writ should be granted because the Court below held that the FPC had no authority under the Federal Power Act to exempt the Safe Harbor contract from the antitrust laws and state law, whereas the

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exception in the FPC orders. On the contrary, the petition of Consolidated stated (p. 20):

> "The Commission necessarily *approved every provision of the Basic Agreement*, except the pecuniary amount of the rates". [Italics Consolidated's.]

Consequently, this Court could not have denied certiorari in the Baltimore contract case on the basis of the presently claimed exception. It is apparent on the face of the FPC orders that they approved and ordered continuance of illegal provisions of the Baltimore contract.

D. C. Circuit has held that the invalidity of the Safe Harbor contract had no effect on FPC orders now on review in this Court founded on the Safe Harbor contract as well as the Baltimore contract.*

The contention is not substantial. The issues are different in the two cases, and necessarily so. The issue in the Safe Harbor contract case (this case) is the similarity of the Safe Harbor contract to the Baltimore contract and its resulting illegality under the Federal antitrust laws and fundamental state law. The issue in the case now before this Court (Nos. 428 and 429) to review the FPC rate orders against Penn Water, is the effect on such orders of the illegality of the Baltimore contract and the Safe Harbor contract, and such effect can only be determined in that case. That issue could not be determined in this, the Safe Harbor contract case, in which no FPC orders are on review.

(b) The Third Circuit Decision.

Petitioners claim that the decision below, holding the Safe Harbor contract illegal, conflicts with a decision of the Third Circuit.**

How the petitioners can bring themselves to make this claim is difficult to understand. There was no issue of any sort before the FPC or Third Circuit in that case regarding the illegality of the Safe Harbor contract.*** The FPC order which was the subject of review in the Third

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* *Pennsylvania Water & Power Co., et al.* v. *FPC, et al.*, 193 F. 2d 230 (1951); cert. granted February 4, 1952.

** *Safe Harbor Water Power Corporation* v. *Federal Power Commission*, 179 F. 2d 179 (1949); cert. den. 339 U. S. 957.

*** Counsel for Consolidated in the District Court so conceded with respect to the Third Circuit case (Tr. 890):

"The Court: But the issue before the Commission was not the reasonableness of the contract.

"Mr. Ramsey: No, this point was not raised."

Circuit case was entered November 4, 1946, whereas the issue of the illegality of the Baltimore and Safe Harbor contracts was not raised until after November, 1948, when Consolidated had used its contractual controls to prevent Penn Water from building a large new steam electric generating plant at Holtwood, Pa., to be fueled by coal dredged from the river (free, except for the cost of processing) and, instead, insisted on taking the business for itself by building a new steam plant of its own in Baltimore, to be fueled by more expensive bituminous coal bought in the market.

As the Fourth Circuit said below (R., p. 242), the Third Circuit case was

> "concerned with the jurisdiction of the Commission over Safe Harbor as a licensee and public utility under the [Federal Power] Act, and with the difficult task of ascertaining the company's rate base and prescribing a reasonable rate of return. There was no discussion of the legality of the restrictions in the Safe Harbor contract, either in the opinion of the Commission or in the opinion of the reviewing court, 179 F. 2d 179."

(c) The decision of the Middle District of Pennsylvania.

The Maryland Commission (but not Consolidated or the FPC) makes a further contention that the decision below is in conflict with a decision of the Middle District of Pennsylvania.* There is nothing to this contention. The only issue in the Middle District of Pennsylvania was whether the taking effect of an order of the Pennsylvania Commission relating to the rates of Safe Harbor should be enjoined in view of the existing order of the FPC also relat-

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* *Consolidated Gas Electric Light & Power Company* v. *Siggins, et al.*, 99 F. Supp. 151 (1951).

ing to Safe Harbor's rates which had been sustained in the above-mentioned decision of the Third Circuit.*

2. The contention that the decision below conflicts with decisions of this Court is untenable.

(a) The Fourth Circuit decision that the contract is illegal *per se* under the antitrust laws is correct.

Petitioners contend that the Fourth Circuit erred in applying decisions of this Court holding contractual provisions of the type found in the Safe Harbor contract to be illegal *per se* and in not testing the legality of the provisions under the rule of reason. It is significant that the FPC in its Memorandum as *amicus* concedes (p. 3) that the arrangement without FPC approval is one "which, as an agreement between the parties, would otherwise violate the Sherman Act."

The same contention regarding the rule of reason was made in the unsuccessful petitions for certiorari of Consolidated and the Maryland Commission in the Baltimore contract case.

Penn Water, in answer, pointed out that contractual provisions of this type, namely, provisions giving Consolidated the power (1) to control the prices charged for electricity by Penn Water, (2) to control the expansion of Penn Water's plant and thus its output of electricity, (3) to control (a) the customers to whom, and (b) the territories in which, Penn Water might sell electricity, and (4) to fore-

* The Maryland Commission also mentions in passing the decision of the D. C. Circuit in *SSW, Inc.* v. *Air Transport Assn.* (July 12, 1951). But that case is in line with the decision of the Fourth Circuit in this case that where there is no specific authority in a regulatory act to grant remedies thereunder or exempt practices illegal under the antitrust laws, the courts, not the regulatory body, have jurisdiction.

close Penn Water from a substantial market, were illegal *per se* under the controlling decisions of this Court.* In the same category was the payment provision, which removed all incentive on the part of Penn Water to compete, to seek new business and to operate efficiently.** The FPC has admitted in this case (Br. before Fourth Circuit, p. 14) that the payment provision prevents "setting up an economic interest upon his [Safe Harbor's] part" and even argued (pp. 33-34) that the restrictions on Safe Harbor were valid because due to the payment scheme "its interests are not adversely affected" by the manner in which it may be operated under the control vested in Consolidated by the Safe Harbor contract.

Here, again, as in their petitions in the Baltimore contract case, Consolidated and the Maryland Commission, instead of discussing decisions of this Court relating to the types of contractual restraints contained in the Baltimore and Safe Harbor contracts and holding such restraints *per*

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* *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 218, 220-224 (1940); *U. S.* v. *Real Estate Boards*, 339 U. S. 485 (1950); *U. S.* v. *Paramount Pictures*, 334 U. S. 131, 143 (1948); *International Salt Co.* v. *U. S.*, 332 U. S. 392, 396 (1947); *U. S.* v. *Bausch & Lomb Co.*, 321 U. S. 707, 720 (1944); *U. S.* v. *Masonite Corp.*, 316 U. S. 265, 274-276 (1942); *U. S.* v. *Trenton Potteries Co.*, 273 U. S. 392, 397-8 (1927). See also decision of Special Statutory Court in *U. S.* v. *Aluminum Co.*, 148 F. 2d 416, 427 (2d Cir. 1945), and the decision of the Fourth Circuit holding an agreement containing similar restraints between two regulated utilities to be invalid under the antitrust laws, *Norfolk Southern Bus Corp.* v. *Va. Dare Transp. Co.*, 159 F. 2d 306 (1947); cert. den. 331 U. S. 827.

** *U. S.* v. *Paramount Pictures*, 334 U. S. 131, 149-150 (1948); *Northern Securities Co.* v. *U. S.*, 193 U. S. 197, 327, 328 (1904); *U. S.* v. *Reading Co.*, 253 U. S. 26, 48 (1920); *Norfolk Southern Bus Corp.* v. *Virginia Dare Transportation Co.*, 159 F. 2d 306, 309-310 (4th Cir. 1947); cert. den. 331 U. S. 827 (1947); *Lee Line Steamers, Inc.* v. *Memphis, H. & R. Packet Co.*, 277 Fed. 5, 8 (6th Cir. 1922); *Chicago, M. & St. P. R. Co.* v. *Wabash, St. L. & P. R. Co.*, 61 Fed. 993, 997 (8th Cir. 1894).

se illegal, call attention to a wholly inapplicable line of decisions by this Court relating to the acquisition by one company of stock or assets of another or arrangements (not involving contractual restraints of the type contained in these contracts), where this Court tested the illegality of the transaction under the rule of reason (CG. Pet., p. 31 and MC. Pet., p. 34).*

The implication in the Maryland Commission petition (p. 33) that there is some sort of "vertical integration" here is obviously unfounded. Consolidated operates at the same level in the industry as Safe Harbor and Penn Water. All three generate power for sale at wholesale and in bulk.

Petitioners contend that the Safe Harbor contract is a lawful one because Penn Water and Consolidated organized Safe Harbor, and there was no actual pre-existing competition before the contract was made. Petitioners cite some cases holding the suppression of pre-existing competition illegal, as if such cases showed that where there was no pre-

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* The *Standard Oil case*, 221 U. S. 1 (1911), the *Yellow Cab* case, 332 U. S. 218 (1947), the *Paramount* case, 334 U. S. 131 (1948), and the *Columbia Steel* case, 334 U. S. 495 (1948), applied the rule of reason to determine whether the defendants were monopolizing or restraining trade by *acquiring assets or stock* of competitors or of corporations using the defendants' products. In the *Paramount* case, as in the *Columbia Steel* case (334 U. S. at pp. 522-3), this Court reaffirmed the principle of *per se* illegality and applied it to the *contractual* arrangements of the defendants, stating (334 U. S. at page 143), "We start, of course, from the premise that so far as the Sherman Act is concerned, a price-fixing combination is illegal *per se*." The *Appalachian Coals* case, 288 U. S. 344, did not involve any contractual restraints upon production and it is not an authority for the proposition that price-fixing is subject to the rule of reason. See *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 224 (1940), and the more recent decisions of this Court referred to above. See also the *Aluminum* case, 148 F. 2d, at page 427. None of the other cases referred to in the petitions in this connection involved *contractual* provisions for price-fixing or *contractual* restraints in any way similar to those provided for in the Safe Harbor contract.

existing actual competition the suppression of future competition is legal.*

Petitioners also cite *Timken Roller Bearing Co.* v. *U. S.*, 341 U. S. 593 (1951), as though that case dealt solely with pre-existing competition. However, this Court there held illegal the agreements in restraint of trade between U. S. Timken, British Timken (controlled by U. S. Timken and one Dewar) and French Timken (which was organized and wholly owned by U. S. Timken and Dewar). This Court made it entirely clear (341 U. S. 595-599) that the agreements were "continuously kept operative" from the time of the organization of French Timken, which was never independent. Consolidated states that French Timken had taken over the trademark rights of a pre-existing competitor. This statement is not supported by the opinion and in any event if the prior existence of a trademark was significant, Safe Harbor, as petitioners concede, was in existence and had considerably more substance prior to the making of the contract in 1931 than a trademark.**

Consolidated's contention regarding the necessity for pre-existing competition is rejected in many cases.*** It has

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* *Northern Securities Co.* v. *U. S.*, 193 U. S. 197 (1904); *U. S.* v. *Terminal Railroad Association of St. Louis*, 224 U. S. 383 (1912); *U. S.* v. *Reading Co.*, 253 U. S. 26 (1920); *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173 (1944).

** Safe Harbor applied for and obtained from the Pennsylvania Commission a certificate of public convenience early in 1930. Safe Harbor was formed in January, 1930 by the merger of two predecessor companies organized in February, 1929, and construction of its dam and hydroelectric development was begun in April, 1930. Consolidated's contention in this connection (Pet., p. 19) that Safe Harbor could not compete because its original certificate limited its sales to Consolidated and Penn Water is obviously unsound since Safe Harbor shortly obtained a certificate permitting sales to others (Tr., p. 705). It is admitted by Consolidated in its petition (p. 19) that Safe Harbor power would come into competition "of course, after it should come into the hands of Penn Water and Consolidated as purchasers".

*** *U. S.* v. *National Lead Co.*, 63 F. Supp. 513, 517, 533-534 (S. D. N. Y. 1945); aff'd 332 U. S. 319; *Kogod* v. *Stanley*

been frequently held that the suppression of potential competition is just as illegal as the suppression of competition which already exists.* Petitioners fail to discuss any of these cases.

Petitioners also seem to try to make a point that suppression of competition between "affiliated" companies is not illegal, but they cite no cases for the proposition, simply claiming that cases generally understood to be holdings to the contrary are not such holdings. The cases cited actually stand for the proposition that suppression of competition within an affiliated group, as well as with companies not affiliated, is illegal.**

In the *Kiefer-Stewart* case, the decision of this Court referred to two affiliated companies as competitors and held that a price-fixing arrangement between them was unlawful because price-fixing is *per se* illegal, stating that such agreements "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." 340 U. S. 213, 215. This reasoning is clearly applicable to the Safe Harbor contract.***

Co. of America, 186 F. 2d 763 (D. C. Cir. 1950); *U. S.* v. *Richfield Oil Corp.*, 99 F. Supp. 280, 292, 293 (S. D. Cal. 1951); *U. S.* v. *Minnesota Mining & Manufacturing Co.*, 92 F. Supp. 947 (D. Mass. 1950).

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* *U. S.* v. *Griffith*, 334 U. S. 100, 107 (1948); *U. S.* v. *Reading Co.*, 226 U. S. 324, 348-349, 351, 370-371 (1912); *U. S.* v. *Aluminum Co.*, 148 F. 2d 416, 429 (Special Statutory Court, 2d Cir. 1945); *U. S.* v. *General Dyestuff Corp.*, 57 F. Supp. 642, 648 (S. D. N. Y. 1944).

** *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951); *U. S.* v. *Griffith*, 334 U. S. 100 (1948); *Schine Theatres* v. *U. S.*, 334 U. S. 110 (1948); *U. S.* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948).

*** Petitioners at times refer to the parties to the contract as "affiliated" and to Safe Harbor as a "wholly-owned subsidiary" or as "jointly owned" by Consolidated and Penn Water. This is clearly erroneous. Consolidated and Penn Water are not affiliated in any respect. Safe Harbor is not a wholly-owned subsidiary of either of them. Safe Harbor is not jointly owned by Consolidated

(b) The decision of the Fourth Circuit that the Safe Harbor contract is illegal, as in violation of Pennsylvania corporation and utility statutes, common law and public policy, is correct.

Petitioners contend that the decision of the Fourth Circuit that the Safe Harbor contract was illegal as in contravention of Pennsylvania corporation and utility statutes,* common law and public policy, and *ultra vires* Safe Harbor, is a violation of the Commerce Clause of the Federal Constitution and conflicts with decisions of this Court holding (i) that the regulatory powers of the Federal government supersede the regulatory powers of the states in the case of companies engaged in interstate commerce, or (ii) that the states have no regulatory powers in certain fields of interstate commerce.**

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and Penn Water. Each owns separately and not jointly one-half of the voting stock of Safe Harbor. This stock in the hands of either is not tied to the Safe Harbor contract and is free to be sold at any time by either without affecting the Safe Harbor contract, so that at any time all or any part of the voting stock in Safe Harbor may be owned by persons having no connection with the Safe Harbor contract. The original bonds of Safe Harbor referred to by the petitioners as guaranteed by Consolidated with indemnity from Penn Water have been retired.

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* The pertinent Pennsylvania statutes are quoted in the record at Tr., pp. 358-361.

** The common law and public policy condemning the Baltimore and Safe Harbor contracts are not peculiar to the State of Pennsylvania but are the general doctrines of common law and public policy applicable to public utility corporations as laid down in a long line of decisions of this Court and other courts, headed by *Gibbs* v. *Consolidated Gas Company of Baltimore*, 130 U. S. 396 (1889), where this Court condemned similar contractual arrangements attempted by Consolidated (or a predecessor) in the gas field, as violative of common law and public policy. In its brief in the Baltimore contract case Consolidated conceded that those contractual arrangements were "vicious". Other cases to the same effect are: *Thomas* v. *Railroad Co.*, 101 U. S. 71, 83 (1879); *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 48-51 (1891); *Arizona Grocery Co.* v. *A. T. & S. F. R. Co.*, 284 U. S. 370, 384 (1932); *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 458-460 (1945); *U. S. Tel. Co.* v. *Central Union Tel. Co.*, 202 Fed. 66, 72-73 (6th Cir. 1913); *Magaha* v. *City of Hagerstown*, 95 Md. 62, 72, 51 A. 832, 835 (1902).

The petitioners cite the same decisions (CG. Pet., p. 34) in support of their contention as they cited in their petitions for certiorari which this Court denied in the Baltimore contract case. As pointed out in Penn Water's reply to those petitions, there was not in the Baltimore contract case, and there is not in this case, any question of regulation of rates and services in interstate commerce. Consequently, there can be no question of conflict between state statutes, public policy or regulation and Federal statutes, public policy or regulation.

In this case we are not in the field of law relating to *regulation* of rates and services, but in the field of law relating to the inherent lack of authority of public utility corporations to violate the fundamental laws of their state of incorporation. Therefore, the reference to the Commerce Clause of the Constitution and to the *Attleboro* case, 273 U. S. 83 (1927) is irrelevant, and other cases cited in Consolidated's petition (p. 34) relating to states putting obstacles in the way of the flow of interstate commerce are also beside the point.

For the first time in this case the specious argument is now made by petitioners that the subject matter of the state law violations is covered by a provision of the Federal Power Act (Section 8) (16 U. S. C. §801) to the effect that no transfer of any license granted under that Act to use navigable waters, or of the rights granted under such a license, shall be made without the approval of the FPC. This provision has no applicability to the corporate rights and duties of Safe Harbor flowing from its incorporation as a utility corporation under the laws of Pennsylvania, or to the duty to exercise managerial powers vested in its Board of Directors by such laws, all of which were surrendered to Consolidated under the Safe Harbor contract.

That this is so is demonstrated by the next succeeding Section 9(b) (16 U. S. C. §802(b) of the Federal Power Act requiring, as a condition of the granting of a license, proof that the applicant has complied with the requirements of the laws of the state and has the right under such laws to engage in the business necessary to operate under the license. This is a recognition that such rights must flow from the laws of the state of incorporation and not from a license issued by the Federal government.

(c) The Fourth Circuit is correct in holding that the courts are not ousted from jurisdiction over antitrust law questions by the Federal Power Act.

There is here no new question, not presented to this Court in the unsuccessful petitions for certiorari in the Baltimore contract case, as to any exclusive primary jurisdiction in the FPC over antitrust law questions. Penn Water pointed out in its answer to such petitions that there simply was no provision in the Federal Power Act or the antitrust laws giving the FPC any authority to exempt any transactions from the antitrust laws or deal with any antitrust law questions.

Penn Water's position in this regard was reenforced shortly after such answer was filed, and certiorari denied, by the enactment by Congress of an amendment to the Clayton Act giving to the FPC a limited power to exempt from Section 7 of the Clayton Act acquisitions of stock or assets which it might approve. Thus Congress clearly indicated that prior thereto the FPC had no power at all to exempt any transaction from the antitrust laws and thereafter had power only to exempt such stock or asset acquisitions. Petitioners make no attempt to refute the clear implication from this new Congressional enactment.

The petitioners erroneously claim that *U. S.* v. *Borden Co.*, 308 U. S. 188 (1939) and *U. S. Alkali Export Ass'n.* v. *U. S.*, 325 U. S. 196 (1945), relied upon by the Fourth Circuit (R., p. 247), are inapplicable. These cases held that the courts are not ousted of jurisdiction over antitrust questions by a regulatory statute which contains no provisions for dealing with such questions. The petitioners state that those cases are distinguishable because they were suits by the *Government,* whereas the present suit is by a *private party.* The same claim was made by petitioners in their unsuccessful petitions for certiorari in the Baltimore contract case.

The claim in any event has been disposed of by the recent decision of this Court in *Far East Conference, et al.* v. *U. S., et al.* (No. 15 Misc., Oct. Term 1951; decided March 10, 1952 after the present petitions were filed). In that decision this Court held that there was no difference in this regard between a suit by the government and a suit by a private party.

Correspondingly, Consolidated's contention (also made in its unsuccessful petition in the Baltimore contract case) that the Fourth Circuit's decision conflicts with *U. S. Navigation Co., Inc.* v. *Cunard SS. Co.*, 284 U. S. 474 (1932) is untenable. As this Court recently pointed out, the *Cunard* case was substantially identical with the *Far East Conference* case. Both cases involved a regulatory statute which contained a specific provision authorizing the regulatory agency to deal with antitrust law questions and to grant exemption from the antitrust laws. In contrast, the Federal Power Act contains no such authorization whatever, either express or implied. Instead, that Act reaffirms the antitrust laws so far as contractual arrangements are concerned by providing in substance in Section 10(h) that the prohibitions of the Sherman Act shall be incorporated

as a condition of every license issued under the Federal Power Act.* Moreover, as both Fourth Circuit decisions held, the contracts involved in both cases are of the type which is illegal on its face regardless of any extraneous facts.

In *Terminal Warehouse Co.* v. *Penn R. Co.*, 297 U. S. 500 (1936) and *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156 (1922), cited by petitioners, just as in the *Cunard* case, the regulatory statute involved (the Interstate Commerce Act) specifically provided a remedy by proceedings before the regulatory agency.**

3. The other miscellaneous contentions of the petitioners are without merit.

(a) The contention that the illegal provisions are separable.

Petitioners erroneously contend that the illegal provisions of the Safe Harbor contract are separable from the

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* Consolidated's petition (pp. 28-29) advances an erroneous contention, which was also advanced in the petitions for certiorari in the Baltimore contract case, to the effect that Section 10(h) gives the FPC authority to enforce the antitrust laws and to pass on antitrust matters. The Fourth Circuit disposed of this argument by pointing out that Section 10(h) was not an operative provision of the Federal Power Act but merely a provision to be incorporated in all licenses, and that the FPC's function was limited to calling all violations of a license to the attention of the Attorney-General for such court action as he might care to take to enjoin the violation or revoke the license. The Fourth Circuit also pointed out that the Secretary of War has a power under the Act similar to that of the FPC (and it would be absurd to claim that the Secretary of War thereby has antitrust powers) and that any proceedings to enforce provisions incorporated in a license pursuant to Section 10(h) must be brought before a court, not the FPC (184 F. 2d 552, 562, 563 (1950)).

** Equally inapplicable is *Northwestern Pub. Serv. Co.* v. *Montana-Dakota Util. Co.*, 181 F. 2d 19 (8th Cir., 1950), cited by petitioners. That case related only to rates and did not involve any question under the antitrust laws or of jurisdiction to deal with such questions.

balance of the contract and that their severance would leave a workable agreement. Allied to this contention is another erroneous one—that the question of whether these provisions are separable is a matter of fact, not of law.

This present contention should be contrasted with the insistence of these same parties in the Baltimore contract case that the similar illegal provisions of that contract were inseparable and that the contract was not workable without them. (Consolidated Br. in the Fourth Circuit, p. 35; see also Supplementary Opinion of Fourth Circuit, 186 F. 2d 934 (1951) at p. 936.) In that case petitioners sought to justify the illegal provisions as necessary for the protection of Consolidated to make the agreement workable. The petitioners actually made the same contention in this case that the restrictive provisions in the Safe Harbor contract were justified as necessary for the protection of Consolidated. (Consolidated Br. in District Court, pp. 13-15.)*

In now making the contention that the restrictive provisions are separable the petitioners talk as though the only illegal provisions of the Safe Harbor contract were the restraints on sales of power and on expansion, and the provisions for an Operating Committee giving Consolidated a veto over the managerial decisions of Safe Harbor. They seek to ignore the other illegal provisions including the payment provision which robs Safe Harbor of incentive to compete, seek new business and operate efficiently, and which was listed among the restrictive provisions by the Fourth Circuit in its opinion in this case (R., pp. 235-6).

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* The situations in the cases cited by the Maryland Commission (Pet., p. 39) have no similarity to this case. All of them involve severability of illegal conditions of various arrangements which are not analogous to the Safe Harbor contract. The cases simply stand for the obvious proposition that where an illegal part of an arrangement is independent of the rest of the arrangement, it is severable and the balance of the arrangement may be left intact.

The District Court expressly held that the illegal provisions were the very "warp and weft" of the agreement and inseparable (R., p. 8), which holding was affirmed by the Fourth Circuit.

As to the contention that the question of separability is one of fact and not of law, petitioners are simply wrong. That question is one which must be determined by a court from an examination of the instrument as the District Court held, citing *U. S.* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 298 (1942) (R., p. 8).*

(b) The contention that summary judgment should not have been granted.

The petitioners erroneously contend that summary judgment should not have been granted, but that there should have been a trial to determine whether the Safe Harbor contract was substantially similar to the Baltimore contract and to go into other alleged issues. This should be contrasted with the contention of the petitioners in the Baltimore contract case that the illegality of the Baltimore contract should be tested on its face and their objection to the admission of any evidence in that case.

Obviously there was no need of a trial to determine whether the contention of Penn Water was correct that the Safe Harbor contract was similar to the Baltimore contract and illegal on its face. The contention that a trial should have been held apparently flows mainly from the petitioners' claim that the contractual restraints here should be tested under the rule of reason. However, since they are of a type which this Court has held are illegal

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* See also *First Seattle D. H. Nat. Bank* v. *C. I. R.*, 77 F. 2d 45, 47, 48 (9th Cir. 1935); *Franklin* v. *American National Insurance Co.*, 135 F. 2d 531, 533 (10th Cir. 1943).

per se, there is no need to go into circumstances surrounding the making of such a contract or its consequences.*

The other alleged issues as to which petitioners claim a trial should have been had were immaterial to the determination of whether the Safe Harbor contract was illegal on its face and were simply issues which the petitioners attempted to inject into the case to prevent summary judgment.

Thus petitioners say that they denied many paragraphs of the complaint. While the complaint proceeded on a number of grounds, the motion for summary judgment was based solely on the contract and certain basic record facts admitted by the petitioners in their answers to the complaint. (Penn Water's reply memorandum in the District Court, pp. 10-11). As the District Court said (R., p. 8): "there is no genuine issue of fact in the foundation upon which the motion for summary judgment is made".

(c) Miscellaneous contentions regarding the Safe Harbor contract.

(i) Petitioners contend that the Safe Harbor contract was entirely independent of the Penn Water contract and that the Fourth Circuit should not have said that the Safe

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* *U. S.* v. *Real Estate Boards*, 339 U. S. 485, 489 (1950); *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221-224, 228 and fn. 59 pp. 224-226 (1940); *U. S.* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927); *U. S.* v. *Masonite Corp.*, 316 U. S. 265, 276 (1942); *U. S.* v. *Reading Co.*, 226 U. S. 324, 326, 358 (1912); *U. S.* v. *Aluminum Co.*, 148 F. 2d 416 (Special Statutory Court, 2d Cir. 1945); *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490 (1949); *Sugar Institute* v. *U. S.*, 297 U. S. 553, 599 (1936); *Eastern States Lumber Association* v. *U. S.*, 234 U. S. 600, 613 (1914); *Thomsen* v. *Cayser*, 243 U. S. 66, 85 (1917); *American Medical Ass'n* v. *U. S.*, 130 F. 2d 233, 248-249 (D. C. Cir., 1942); aff'd 317 U. S. 519; *U. S.* v. *National Lead Co.*, 63 F. Supp. 513, 525 (S. D. N .Y., 1945); aff'd 332 U. S. 319.

Harbor contract was invalid because dependent on the invalid Baltimore contract. Even if this contention had any merit, it would be immaterial because the statement was unnecessary to the decision of the Fourth Circuit, its decision being based on the independent ground that the Safe Harbor contract taken alone was illegal on its face (R., p. 237). The District Court, as well as the Fourth Circuit, so held.*

(ii) The petitioners contend that one of the many restrictive provisions in the Safe Harbor contract had somehow ceased to be effective and therefore should be counted out of consideration, viz., the last sentence of Article III(a) which provides that Safe Harbor may not sell any power from any addition to its plant to any other party without the consent of Consolidated and Penn Water, clearly a restrictive provision illegal *per se*.

The contention is not significant because it leaves all of the other illegalities of the contract. However, the two reasons advanced by the petitioners for the ineffectiveness of the sentence are not tenable.

Petitioners contend that an investigation into the facts would show that the sentence is not restrictive as a practical matter because expansion by Safe Harbor would not be economically justified. While such facts are immaterial

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* The Safe Harbor contract had previously been conceded in Consolidated's Brief in the Fourth Circuit in the Baltimore contract case to be a "sister contract" to the Baltimore contract (p. 34) and "supplementary" to it (Br., p. 35) and both contracts to be "in essence an energy sales contract". Furthermore, the District Court (R., p. 4) referred to "the recitals in the second and third paragraphs of the 2-party agreement [Baltimore contract] virtually avowing the 2-party to be the master agreement operating the 3-party contract [Safe Harbor contract]. Article II expressly incorporates Safe Harbor power as an item of the 2-party agreement. The supplement, dated August 1, 1932, to the 3-party contract reaffirms the terms of the latter but in its section Fourth adopts some of the terms of the 2-party agreement."

as a matter of law since the restriction is illegal *per se*, a conclusive answer is that an important addition to Safe Harbor's plant was made in 1939. The supplemental agreement of November 22, 1939 related to this addition (an installation of a seventh generator in addition to the six previously in the plant) and provided for the disposition of the output of the addition (R., pp. 111-12).

Petitioners also contend that the last sentence of Article III(a) was "amended" by the FPC. This claim has no basis whatever and was not made in the District Court or even in the Fourth Circuit until the filing of Consolidated's reply brief.

The claim is that the FPC provided in its rate order that the original rate base on which Safe Harbor was to receive a specified percentage return from Consolidated and Penn Water under Article V should be enhanced by adding the cost of any additions made to Safe Harbor's plant. It is difficult to see how this could be an amendment of the last sentence of Article III(a) or eliminate its restrictive provisions. There is no inconsistency between adding the cost of additions to Safe Harbor's rate base and the restrictions of that sentence. The basic contractual arrangement was that Safe Harbor could sell any of its energy to others with the consent of Consolidated and Penn Water, provided the revenues received therefrom should be credited under Article III(c) against the fixed return on Safe Harbor's rate base payable by Consolidated and Penn Water under Article V. The payment of a specified return on the additional rate base is in no way inconsistent with the necessity for obtaining the consent of Consolidated and Penn Water to Safe Harbor's power sales to others.

(iii) The claim of the petitioners that in order to finance Safe Harbor, Safe Harbor had to have a long-term

contract *like this contract* is obviously untenable. The project could have been developed under a long-term contract of the usual type in the industry with unit rate payments for capacity and energy furnished and without managerial controls by one company over another.

(d) Miscellaneous contentions of the Maryland Commission.

Although the miscellaneous contentions of the Maryland Commission mentioned below are immaterial, it may be of interest to the Court to have them disposed of briefly:

(i) The Maryland Commission alleges that it is the basic purpose of Penn Water in this case to avoid FPC jurisdiction and deny to Maryland its "fair share" of Safe Harbor power. These claims are destroyed by the record in the Baltimore and Safe Harbor contract cases. Penn Water has consistently offered to Consolidated the same services Consolidated has been receiving. Such service is necessarily interstate and subject to whatever system of regulation the Federal statutes provide for.

(ii) The above claim is closely associated with another assertion of the Maryland Commission that there is some issue in this case as to the Maryland public's "fair share" of Safe Harbor power. Of course, there can be no such issue in the case.

In this connection, two myths regularly advanced by counsel for the Maryland Commission should be dissipated.

One is that the Maryland Commission permitted the output of the hydroelectric plant at Conowingo on the Susquehanna River in Maryland, owned by another utility corporation, to go into Pennsylvania in reliance on Maryland's obtaining Consolidated's alleged contractual entitlement under the Safe Harbor contract to the power generated in

the Safe Harbor plant on the Susquehanna River in Pennsylvania. The facts of public record destroy this claim. The Safe Harbor project was not begun (1930) and the Safe Harbor contract with Consolidated was not made (1931) until long after the Conowingo project had been approved (1926).

The second of the myths is that the Maryland public is somehow dependent for power on the alleged contractual entitlement of Consolidated to Safe Harbor power under the Safe Harbor contract and if such entitlements are not continued Consolidated will have to install additional steam generating facilities. The admitted fact is that for many years Consolidated has not received the alleged two-thirds entitlement to Safe Harbor power but substantially less than that amount. The alleged two-thirds entitlement has been used simply as a contractual device to give Consolidated a money credit (at relatively high cost of steam generation) for Safe Harbor power delivered to and paid for by Pennsylvania utilities.

(iii) Counsel for the Maryland Commission (Pet., p. 7) refers to Penn Water's alleged "synthetic picture of its operations" and says that Penn Water "seeks to create the far-fetched impression that it is a small company, being gradually strangled by a series of restraints forced upon it by Consolidated and designed to restrain trade."

But this picture, far from being synthetic, is obviously true. Penn Water and Safe Harbor are small companies compared to Consolidated and they have been strangled by Consolidated and prevented from competing with it by the Baltimore and Safe Harbor contracts. There was mentioned above one of the uses made of the restrictive provisions, to prevent the construction of a new steam generating plant by Penn Water so that Consolidated could take the business by building a new steam plant of its own.

Conclusion.

We do not believe that this Court will want to take up its time in a review of the details of the claim that the Safe Harbor contract is not substantially similar to the Baltimore contract, the only new question presented by the petitioners which was not in the previous petitions for certiorari which were denied in the Baltimore contract case.

It is respectfully submitted that the petitions for certiorari should be denied.

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Pennsylvania Water & Power Company.

March 22, 1952.

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IN THE

Supreme Court of the United States

October Term, 1951

Nos. 611 and 615

CONSOLIDATED GAS, ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE and PUBLIC SERVICE COMMISSION OF MARYLAND,

Petitioners

vs.

PENNSYLVANIA WATER & POWER COMPANY

and

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondents

BRIEF OF RESPONDENT, PENNSYLVANIA PUBLIC UTILITY COMMISSION IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

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Case Caption

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1951

Nos. 611 and 612

Consolidated Gas Electric Light and Power Company of Baltimore and Public Service Commission of Maryland

Petitioners,

v.

Pennsylvania Water & Power Company and Pennsylvania Public Utility Commission,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENT PENNSYLVANIA PUBLIC UTILITY COMMISSION IN OPPOSITION

The petitions of Consolidated Gas Electric Light and Power Company of Baltimore (Consolidated) and of Public Service Commission of Maryland (Maryland Commission) for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit and the memorandum of the Federal Power Commission (FPC) in support of the foregoing petitions seek review of a decision which in all material respects followed a previous decision holding invalid a companion wholesale power agreement (Baltimore contract). This Court, as regards that contract, denied the petitions for a writ of certiorari.

> *Pennsylvania Water & Power Co., Pennsylvania Public Utility Commission v. Consolidated Gas Electric Commission of Maryland,* 184 F. 2d 552 (1950), *cert. denied* 340 U. S. 906 (1950).

The issues raised in the instant petitions are, with a single exception, substantially identical

with those asserted in the prior case. The only issue not previously presented in the prior case is whether the Safe Harbor Contract, the subject matter of the instant case, and the Baltimore Contract are substantially identical.

Assertions that difference does exist were made in both the District Court and the United States Court of Appeals Fourth Circuit and in each instance the Court unanimously determined that (1) The contracts were "inextricably inter dependent", and (2) The Safe Harbor contract contains restraints sufficient in themselves to require a judicial determination of illegality *per se*.

No useful purpose would be served by a detailed analysis of the contracts or an analysis seriatum of the respective reasons assigned for allowance of the several petitions. Such would necessarily constitute a duplication or repetition of matters and arguments set forth in the brief of Pennsylvania Water & Power Co. filed in opposition to the instant petitions for a writ of certiorari.

Pennsylvania Public Utility Commission does, however, desire to refer your Honorable Court to certain inaccuracies and misstatements contained in the respective petitions.

Consolidated suggests that the holding of the Court below was "solely by reason of *four* separable provisions"; that "these *four* provisons * * * were minor and unimportant ones"; that the Fourth Circuit failed to find illegality in the connection with the two contracts and merely "imputed illegality"; and, that the Pennsylvania Commission approved the Safe Harbor agreement.

The Fourth Circuit held that the provisions were not separable, that with regard to the unimportance of the illegal provisions that "In addition, as the District Judge found, the restraints contained in the Safe Harbor contract itself are sufficient to invalidate it". Quoting from the language of the District Court the Fourth Circuit held that "These stipulations are strangulations. They choke each of the recipients in its full exercise of its ownership in the power purchased of Safe Harbor; they choke Safe Harbor too. They do not merely limit one party from impinging the other's rights; their reach is more than defensive."

The Fourth Circuit clearly held that by reason of the provisions of the contracts themselves, which contained reference to each other, together with assertions of Consolidated in prior briefs, that the two contracts were "inextricably inter

dependent," the Safe Harbor contract was "part of an illegal plan which violates the federal anti-trust statutes and the public service laws of the State of Pennsylvania."

There was no imputation of illegality; rather a determination of the illegality of the Safe Harbor contract itself. The Fourth Circuit proceeded to adopt the language of the District Court holding that irrespective of the Baltimore contract the provisions in the instant Safe Harbor contract were sufficient of themselves to invalidate it.

Pennsylvania Public Utility Commission submits that the sole issue here raised which was not before this Court in the prior case (*Pennsylvania Water & Power Co. et al., Pennsylvania Public Utility Commission v. Consolidated Gas Electric Light and Power Company of Baltimore, Public Service Commission of Maryland,* 184 F. 2d 552 (1950) *cert. denied,* 340 U.S. 906 (1950)) is whether the Safe Harbor contract is substantially similar to the Baltimore contract. This issue was determined in the affirmative by both the District Court and the Fourth Circuit at Baltimore. There is no question of a federal nature here involved.

Pennsylvania Public Utility Commission respectfully submits that the respective petition,

for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

Nos. 611 and 612

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE and PUBLIC SERVICE COMMISSION OF MARYLAND,

Petitioners,

v.

PENNSYLVANIA WATER & POWER COMPANY and PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CONSOLIDATED'S REPLY BRIEF TO PENN WATER'S BRIEF IN OPPOSITION

Penn Water's Brief in Opposition contains so many misleading statements and unsound contentions that a complete and adequate refutation would require an extended reply brief, which would not be appropriate. We will limit ourselves herein to short replies to six of the basic errors in Penn Water's brief.

I.

Penn Water's brief (p. 3) states that the Safe Harbor Agreement "by its express terms, give(s) Consolidated these restrictive control powers over the seller" (Safe Harbor), namely, "control to Consolidated over the seller's contracts, sales, prices, territories, markets, output and expansion".

The *answer* is that the Safe Harbor Agreement (R. 91-112), except to the extent that it constitutes a sale of Safe Harbor's entire output of hydro-energy to its two owners, does *none* of these things. The most that can be said is that the Safe Harbor Agreement constitutes an exclusive sales contract. But, there being no question of monopoly, this feature, under controlling decisions of this Court, does not render it illegal *per se*. The Fourth Circuit did not condemn it because it was an exclusive sales contract. Penn Water's contractual share and Consolidated's contractual share of Safe Harbor's entire output were held to be each company's "rightful entitlement" (R. 237).

The Safe Harbor Agreement provides that Safe Harbor will sell, and Penn Water and Consolidated will purchase, *all* the output from Safe Harbor's 7-generator plant. Since the FPC's order of November 4, 1946 (Tr. 567-8), modifying the Safe Harbor tariff, and by Penn Water's and Consolidated's acquiescence therein, Penn Water and Consolidated are also the exclusive contract purchasers of any output which may result from any hypothetical hydro-generating additions to this 7-generator plant. The Safe Harbor Agreement contemplates, and provides for, no sales by Safe Harbor of any of its output to others, except such as "may be required for the performance of any duty or obligation to serve imposed on it (Safe Harbor) by its charter or otherwise by law". It is only from such outside sales of hydro-energy which may be required by law, that Penn Water and Consolidated become entitled to be credited on bills to them

with Safe Harbor's revenues.[1] In return for this purchase of all of Safe Harbor's output, Penn Water and Consolidated agree to pay Safe Harbor all of its operating expenses, taxes, depreciation and the net return upon its investment in hydro plant. Thereafter, in the Safe Harbor Agreement, come the *separable* provisions which have never operated and which were the only provisions thereof which the Fourth Circuit, in the present case, purported to find illegal *per se*. They are:

(a) Under the heading "*Other* Entitlements" (R. 95), which imports separability, Safe Harbor obligates itself to install any proper and reasonable additional machinery or equipment in its plant upon the joint request of its customers, Penn Water and Consolidated (see Art. III(a), first sentence). Safe Harbor itself remains entirely free to expand its plant to the extent expansion is feasible and permitted by charter and franchise powers and by regulatory authorities, and, since the FPC's order of November 4, 1946, requires Penn Water and Consolidated to pay Safe Harbor a return on its investment in such additions, Safe Harbor has every incentive to do so. Such requests of its customers, to be effective, must be reasonable ones. Otherwise they would violate Art. IV of the Agreement providing for the most economical and efficient facilities (R. 96-97), and would fail to obtain the approval of the FPC which is required by U.S.C. Title 16, Sec. 803(b).

(b) Under the same separable heading (R. 95), Safe Harbor originally agreed not to sell any of its output, if there

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[1]Hence the statement on page 25 of Penn Water's brief that "The basic contractual arrangement was that Safe Harbor could sell any of its energy to others with the consent of Consolidated and Penn Water, provided the revenues received therefrom should be credited under Article III(c) against the fixed return on Safe Harbor's rate base payable by Consolidated and Penn Water under Article V," is erroneous. Sales by Safe Harbor of its energy to others was not contemplated by the Agreement, except sales required by law and originally sales of output from hypothetical additional generators.

should be any such hypothetical output from additions to hydro-plant, to persons other than Penn Water and Consolidated without their consent (see Art. III(a), second sentence). This provision was, however, at all times completely academic and inoperative, because Safe Harbor, by reason of insufficient river flow (R. 141, 142), never has added, and can never feasibly add in the future, any additional generators to its 7-generator plant.[2] Furthermore, since the said order of the FPC dated November 4, 1946, the Safe Harbor tariff has been modified so as to place any hypothetical additional output on precisely the same footing as Safe Harbor's output from its existing 7-generator plant, namely, subject to the exclusive right and obligation of Penn Water and Consolidated to purchase it outright;

(c) Safe Harbor agrees that it will not make such independent side agreements with either of its two customers as will have the effect of impairing the obligations of the parties for the most economical coordination of their facilities and most efficient operations. (See Art. IV, last sentence (R. 97), which expressly qualifies and limits this provision by the words "For this purpose", i.e., for the purpose of economy and efficiency stipulated for in the rest of Art. IV); and

(d) Penn Water and Consolidated agree (R. 105) to set up an Operating Committee composed of a representative of each of them *solely* "for investigation, consultation and advice in all operating, engineering and accounting matters

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[2]Penn Water's brief (p. 25) attempts to negative this all important fact by stating that "an important addition to Safe Harbor's plant was made in 1939". Penn Water fails to state, however, that this addition was the originally contemplated seventh and final generator to which the parties were originally committed in 1931, but the installation of which was deferred until its output could be utilized by the Pennsylvania Railroad (R. 161, Tr. 803-4). Penn Water on page 21 in its brief filed in the Fourth Circuit conceded that this seventh and last generator was part of the "initial development".

pertaining to this Agreement", with no powers whatever to dictate to or bind Safe Harbor or any of the other parties to the Agreement (see Art. XIV). The statement in the second footnote on page 4 of Penn Water's brief that the provisions for an Operating Committee give "Consolidated a veto over managerial decisions of the seller" is completely untrue. The Safe Harbor Agreement by its terms gives Consolidated no such veto and the Operating Committee, in practice, has confined itself strictly to "consultation and advice".

Now it is obvious, we submit, that none of the foregoing provisions of the Safe Harbor Agreement gives Penn Water and Consolidated control over Safe Harbor's contracts or sales, except, of course, that Safe Harbor, having contracted to sell its entire output to Penn Water and Consolidated, cannot sell the same output to others, and except that Safe Harbor may not make independent contracts with either Penn Water or Consolidated which would work against the stipulated efficiency and economy in the coordination of the facilities of the three parties. It is also obvious that none of the foregoing provisions of the contract gives control to Penn Water and Consolidated over Safe Harbor's prices, territories, markets or expansion. The Safe Harbor Agreement, of course, stipulates the initial price at which Safe Harbor will sell its entire output to Penn Water and Consolidated, but this agreement as to price between sellers and buyers is certainly not "market price fixing", and these initial prices are expressly subject to modification by the FPC, which has modified and fixed them. The Safe Harbor Agreement leaves Safe Harbor completely free to expand its plant by adding any additional facilities which its Board of Directors decide to add, and Safe Harbor, and its directors, have repeatedly done so, subject to the exclusive jurisdiction of the FPC to approve or disapprove any expansion of the licensed project in excess of 100 horsepower (U.S.C. Title 16, Sec. 803(b)). Safe Harbor is completely free to exercise its

individual initiative, and that of its directors, to seek broader charter and franchise powers. For example, if Safe Harbor should wish to apply for charter and franchise powers to build a steam electric generating plant, it would be completely free, as far as the Safe Harbor Agreement is concerned, to do so and to sell the output therefrom to anyone it pleases. Safe Harbor is completely free to exercise its initiative to apply to any governmental regulatory authority having jurisdiction with regard to its rates and services as a Federal licensee and interstate public utility.

II.

Penn Water's brief (pp. 2, 4) states that the Safe Harbor Agreement is a "substantially identical contract" with the Baltimore Contract and is "substantially similar to the Baltimore Contract", and that "provisions to the same effect [as Arts. IV and V of the Baltimore Contract] are contained in the Safe Harbor contract".

The *answer* is that this is simply incorrect, as a mere reading of the two agreements will show. There were also differences in parties, nature and effect. Consolidated has never conceded in the instant case that the two contracts were similar. On the contrary, it was at great pains to point out to the Fourth Circuit the many and controlling differences between the two. The statement of Consolidated's counsel, quoted on page 5 of Penn Water's brief from page 35 of Consolidated's brief filed in the Fourth Circuit in the Baltimore Contract case, obviously did not mean that the two agreements constituted *one* energy sales contract, but that *each* of them is an energy sales contract with the provisions of *each* constituting terms of sale.

Arts. IV and V of the Baltimore Contract do not appear in the Safe Harbor Agreement and there are no provisions of the Safe Harbor Agreement similar to them.

Arts. IV and V of the Baltimore Contract provided that,

"So far as possible, consistently with the performance of any duty or obligation to serve imposed" on Penn Water "by its charter or otherwise by law", Penn Water should obtain the approval of Consolidated before making contracts with others for the purchase of energy from, or the sale of energy to, such other persons, and before making additional investments in plant in excess of $50,000, or disposing of plant property having a value in excess of $50,000. These restrictions in the Baltimore Contract were necessary (since Penn Water made sales to others for Consolidated's credit and account) to protect Consolidated's open-end obligations under the Baltimore Contract to purchase all of Penn Water's energy *not sold to others,* and to pay Penn Water all of its operating expenses, including the cost of purchased energy, and a net return upon all of Penn Water's investment.

Penn Water's brief (p. 8) contends that there is inconsistency between Consolidated's position that Arts. IV and V of the Baltimore Contract were inseparable from the rest of that contract, and Consolidated's position that the four provisions of the Safe Harbor Agreement described in Point I hereof were separable. There is no inconsistency whatever, for the very reason that the two Agreements and the so-called restrictions they respectively contain are completely different.

It is submitted that even Arts. IV and V of the Baltimore Contract did not effect market price fixing, monopoly, boycott or exclusion of competitors from the market (the only restraints which this Court has held illegal *per se*), and that it was, therefore, erroneous for the Fourth Circuit to have held the Baltimore Contract illegal on its face as *per se* violative of the antitrust laws, even upon the assumption that the Fourth Circuit had jurisdiction over the validity of the Baltimore Contract. Under applicable decisions of this Court, provisions such as these, before being condemned, should have been tested, after trial of the dis-

puted material facts, in the light of the factual criteria of the Rule of Reason, including (a) the lack of competition between Penn Water and Consolidated, either actual or potential, and (b) the fact that the Baltimore Contract was subject to complete governmental regulation as an interstate tariff of a licensee and public utility on file with the Federal Power Commission. The decision of the Fourth Circuit holding the Baltimore Contract illegal *per se* on its face and refusing to test it under the Rule of Reason was manifestly unsound and erroneous, even upon the assumption that the Fourth Circuit had jurisdiction of the question. This Court's denial of certiorari to review that decision of the Fourth Circuit "imports no expression of opinion upon the merits of the case, as the bar has been told many times" and "lends no support" to the Fourth Circuit's decision purporting to hold the Baltimore Contract invalid. See *U. S. v. Carver,* 260 U. S. 482, 490 (1923); *Agoston v. Pennsylvania,* 340 U. S. 844 (1950).

But be that as it may, the Fourth Circuit was *a fortiori* in error, even upon the assumption that it had jurisdiction, in *summarily* striking down the Safe Harbor Agreement on its face as *per se* in violation of the Sherman Act. This is so, because (1) Safe Harbor was not in actual or potential competition with Penn Water or Consolidated (R. 48, 124-5, 129-146, 149-152), and could not have been held to be in such competition in summary judgment proceedings, and (2) the Safe Harbor Agreement did not contain Arts. IV and V of the Baltimore Contract or any provisions like them. The only so-called "restrictions" in the Safe Harbor Agreement are those four provisions described in Point I hereof. None of them effected price fixing, monopoly, boycott or the exclusion of competitors from a market. If any of them, after trial, should be held to constitute unreasonable restraints, they were separable from the remainder of the Agreement and could not justify the invalidation of the entire Agreement.

III.

Penn Water's brief (p. 2) states that "The only issue in the Safe Harbor contract case which was not before this Court when it denied certiorari in the Baltimore contract case is whether the Safe Harbor contract is substantially identical with the Baltimore contract".

The *answer* is that, even if the Safe Harbor Agreement and the Baltimore Contract were identical, we have in the instant case (but not in the Baltimore Contract case) an admitted head-on conflict between the decision of the Fourth Circuit assuming jurisdiction over the validity of the Safe Harbor Agreement and summarily holding it invalid, and the decision of the District of Columbia Circuit holding that the FPC has primary jurisdiction over the validity of the Safe Harbor Agreement, and affirming the application of the Safe Harbor tariff as valid. If one of these decisions is right, the other is wrong. When this Court denied certiorari to review the Fourth Circuit's decision in the Baltimore Contract case, the District of Columbia Circuit *had not rendered such conflicting decision.* The instant case tenders two issues which this Court should decide, namely, (1) whether the FPC, and the District of Columbia Circuit exercising direct statutory review, or the Fourth Circuit in collateral attack procedings, had jurisdiction to determine the validity of the Safe Harbor Agreement, the provisions of which, as modified, were prescribed in their entirety by FPC as Safe Harbor's tariff of rates and services, and (2) whether the Safe Harbor Agreement, by reason of the provisions thereof described in Point I hereof, *supra*, could be held invalid *per se* on its face.

Of course, an initial issue is what does the Safe Harbor Agreement provide and what is its effect. In any case in which the validity of a contract is drawn in question, the first step must be to read and interpret that very contract, and decide what it does. Penn Water would have this Court *assume* conclusively that the Fourth Circuit was right in

its interpretation and then pass on from there. Whether the Fourth Circuit was correct in its view as to the merits of the Safe Harbor Agreement depends (1) upon the terms of the contract, and (2) upon the nature of the parties thereto and the relevant surrounding circumstances. The Fourth Circuit erred in its interpretation and it excluded from consideration the surrounding circumstances because it proceeded by way of *summary* judgment.

IV.

Penn Water's brief (pp. 8, 9) states that "There is no merit in the contention that the writ should be granted because the decision below *allegedly* conflicts with decisions of the District of Columbia Circuit" and that "The issues are different in the two cases [the instant case and the decision of the District of Columbia Circuit] and necessarily so".

The *answer* to this can be quoted directly from Penn Water's Petition for Certiorari to review the District of Columbia Circuit's decision. In that Petition (p. 1) Penn Water stated:

> "Such judgment and orders of the D. C. Circuit were entered on the decisions of a divided Court and were in direct conflict with unanimous decision of the United States Court of Appeals for the Fourth Circuit as to which this Court denied certiorari, and the related decision of the United States District Court for Maryland declaring illegal the same two power contracts and holding that the FPC had no authority to validate them by the orders here involved."

Having sought and obtained from this Court the writ of certiorari to review the decision of the District of Columbia Circuit on the ground that it conflicts directly with the decision in the instant case, Penn Water now stultifies itself by denying the existence of such conflict.

V.

Penn Water's brief (p. 6) states that the issues: (1) as to whether the FPC, or the Fourth Circuit in collateral attack proceedings, has primary jurisdiction over the Safe Harbor Agreement and (2) as to the effect which the Fourth Circuit's purported invalidation of the Safe Harbor Agreement may have upon the order of the FPC modifying and approving the Safe Harbor Agreement and ordering that it be observed as Safe Harbor's tariff, "cannot be determined in the present case in which no FPC orders are on review" and "can only be determined" in cases Nos. 428 and 429 on review by this Court of the decision of the District of Columbia Circuit.

The *answer* is that the Fourth Circuit, in the instant case, notwithstanding the objection to its jurisdiction based upon the Federal Power Act and the orders of the FPC prescribing the terms of the Safe Harbor Agreement as a filed tariff, assumed the jurisdiction and purported to strike down this filed tariff as invalid. While the order of the FPC is not on review in the instant case, a collateral judgment purporting to strike down and undo the order of the FPC is directly on review.

Thus, the instant case directly presents the issues: (1) whether the FPC or the Fourth Circuit had jurisdiction, and (2) whether the Safe Harbor Agreement, having been prescribed as a public utility tariff, is invalid on its face as *per se* violative of the Sherman Act. These issues can be and should be determined by this Court in the instant case.

VI.

Penn Water's brief (p. 7) states that the Fourth Circuit's decision in the instant case summarily striking down the Safe Harbor Agreement as *per se* in violation of the Sherman Act represents an "entirely orthodox application of the antitrust law decisions of this Court to the Safe Harbor contract".

The *answer* is that, assuming *arguendo* the jurisdiction of the Fourth Circuit, its action in purporting to invalidate the Safe Harbor Agreement was completely unorthodox. So novel was that decision that the Fourth Circuit, in its opinion, cited not a single decision of this Court supporting its action. Its decision, if permitted to stand, creates a wholly new departure in the field of antitrust law. Penn Water contends that the Fourth Circuit's decision is supported by the decisions of this Court holding market price fixing illegal *per se*. These decisions relied on by Penn Water are: *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940); *U. S.* v. *Real Estate Boards*, 339 U. S. 485 (1950); *U. S.* v. *Bausch & Lomb Co.*, 321 U. S. 707 (1944); *U. S.* v. *Masonite Corp.*, 316 U. S. 265 (1942) and *U. S.* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927). Penn Water also relies upon the wholly inapplicable *International Salt Co.* v. *U. S.*, 332 U. S. 392 (1947) holding the exclusion of a competitor from a substantial market to be illegal *per se*.

By no stretch of the imagination can the Safe Harbor Agreement be forced into the category of market price fixing or the exclusion of competitors from a substantial market.

With regard to the validity of the Safe Harbor Agreement under the Sherman Act, the question is simply this:

Is it illegal *per se* under the the Sherman Act (not to be justified under any circumstances), for an electric utility, in its prescribed tariff of interstate rates and services, to agree to sell its entire output to its two parent companies, which created it, simply because the contract of sale also provides: (1) that the utility will make any reasonable expansion of its plant facilities that its two customers together request it to make, (2) that the utility will refrain from making such separate side agreements with either of its two customers as will defeat efficiency and economy in the coordination of the facilities and operations of the parties under the contract, and (3) that the two customers shall have the benefit of "investigation, consultation and advice" of a

joint committee appointed by them on "operating, engineering and accounting matters" pertaining to the operation of the contract?

The Sherman Act cases pertinent to the Safe Harbor Agreement are those which require application of the Rule of Reason and the factual criteria thereof set forth in *Board of Trade of Chicago v. U. S.*, 246 U. S. 231, 238 (1918). In that case we have been told just what factual considerations must be taken into account and given weight. They are: (1) the nature of the business restrained and the facts peculiar to that business; (2) the nature of the restraint itself; (3) the purpose of the restraint and the reasons for adopting it; (4) the effect of the restraint, actual or probable; (5) the history of the restraint; and (6) a comparison of the conditions of the business and market restrained before and after the restraint was imposed.

Certainly, in view of the nature of Safe Harbor, Safe Harbor's relationship to Penn Water and Consolidated, the absence of competition, actual or potential, Safe Harbor's relationship to the FPC, the nature, terms and effect of the Safe Harbor Agreement, the way in which it has operated for over twenty years, and, most importantly, the accommodation which must be made between the Federal Power Act and the Sherman Act, there is no room for summarily adjudging the Safe Harbor Agreement in isolation. Every feature of this case demands that standards of reasonableness be applied to it.

Respectfully submitted,

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March 26, 1952.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

Nos. 611 and 612

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE AND PUBLIC SERVICE COMMISSION OF MARYLAND,
Petitioners,

VS.

PENNSYLVANIA WATER AND POWER COMPANY AND PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondents,

REPLY BRIEF OF PETITIONER PUBLIC SERVICE COMMISSION OF MARYLAND

CHARLES D. HARRIS,
General Counsel,
Public Service Commission
of Maryland.

Baltimore, Maryland
March 27, 1952

The Daily Record Co., Baltimore 3, Md.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

Nos. 611 and 612

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE AND PUBLIC SERVICE COMMISSION OF MARYLAND,
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VS.

PENNSYLVANIA WATER AND POWER COMPANY AND PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondents,

REPLY BRIEF OF PETITIONER PUBLIC SERVICE COMMISSION OF MARYLAND

Certain statements in the brief in opposition of the respondent, Pennsylvania Water and Power Company (Penn Water), particularly on pages 26 and 27 thereof, call for an answer by the Maryland Commission.

The statement that "Penn Water has consistently offered to Consolidated the same services Consolidated has been receiving" is simply not true. If it were true, neither Consolidated nor the Maryland Commission would be requesting the assistance of this Court to retain those services for the benefit of the Maryland public.

Moreover, Penn Water would not be asking this Court to nullify the FPC rate orders, setting reasonable rates for those services, now before this Court in Cases Nos. 428 and 429. Those rate orders merely preserve the services as they have been conducted since 1931, but require Penn Water's rates therefor to be reasonable. If Penn Water is not seeking to change its *services* to Consolidated so as to escape FPC's rate control, it would be asking this Court in Cases Nos. 428 and 429 to review FPC's determinations as to rate base, rate of return, etc. Instead, it urges as its main and almost sole argument, in those cases, that the basic service *contracts* are unlawful.

The record in Cases Nos. 428 and 429 will show that FPC eliminated from its rate orders the only provisions which Penn Water questioned in the first instance in the Penn Water contract (Articles IV and V), and the only provisions which the Fourth Circuit found to be invalid. The only provisions of the Safe Harbor contract considered by the Fourth Circuit as making it illegal have played no part during its 20 years of operation, and are clearly separable. Consolidated and the Maryland Commission urged their separability upon the Fourth Circuit, and urge it here.

If Penn Water does not want to change Safe Harbor's obligation under the Safe Harbor FPC tariff to supply Consolidated with two-thirds of the Safe Harbor output, or if it does not want to change Penn Water's obligation to compensate Consolidated for its diversion of power to Penn Water's Pennsylvania customers, as such compensation was ordered by FPC, why does Penn Water seek to destroy the entire Safe Harbor agreement?

Penn Water's obvious purpose is to obtain for its own use in Pennsylvania (with the aid of the Pennsylvania Commis-

sion) as much of the inexpensive Safe Harbor power as possible. Such power, diverted into Pennsylvania, would have the advantage not only of being inexpensive but, under the arguments of both Penn Water and the Pennsylvania Commission, would escape FPC control by such use in Pennsylvania. Consolidated and the Maryland public would lose the two-thirds share of Safe Harbor power which has been their legal entitlement since 1931, and which has been so found by every court and commission that has faced the question, including the Fourth Circuit.

Since the Maryland Commission approved Consolidated's investment in two-thirds of Safe Harbor's equity capital, its guarantee of all of the original bonds directly, and has permitted Consolidated throughout the development years to guarantee Safe Harbor's operating expenses, taxes (including income taxes), and a specified return in reliance upon Consolidated's long-term rights to Safe Harbor power, we do not accept lightly the *characterization* as a "myth" that the Maryland public is dependent for power on Consolidated's contractural entitlement to two-thirds of the Safe Harbor output.

It is no "myth" to the Maryland public that the 1950 Safe Harbor rate reduction affirmance* resulted in a prompt passing on to the public of those benefits, through a rate reduction by Consolidated. It is no "myth" that the affirmance of the Penn Water rate reduction (now before this Court in Cases Nos. 428 and 429) will involve annual rate reductions to Consolidated for 1949, 1950, and 1951 of $1,700,000 on the 1946 basis used by FPC. Whatever the amount, Consolidated has pledged to the Maryland Com-

* Safe Harbor Water Power Corp. v. Federal Power Commission, 179 F. 2d 179, cert. denied 339 U. S. 957 (1950).

mission that it will pass on these benefits to the public, as ordered by our Commission.

As to the asserted Conowingo "myth," we re-assert the correctness of our statement. An examination of our original approval of the service, of the Conowingo Company's charter, and of the various changes in the Maryland statutes will support our position if it should ever become an issue. We made our statement in the first instance and confirm it now, primarily to emphasize that the Maryland public, through the Maryland Commission, in attempting to preserve Consolidated's right to the full benefit of two-thirds of Safe Harbor power. In doing so, the Maryland public is asking for no more than its fair and equitable share of the Susquehanna River power generated in Maryland and Pennsylvania.

Respectfully submitted,

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General Counsel,
Public Service Commission
of Maryland.

Baltimore, Maryland

March 27, 1952

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 428

PENNSYLVANIA WATER & POWER COMPANY, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

No. 429

PENNSYLVANIA PUBLIC UTILITY COMMISSION, PETITIONER

v.

FEDERAL POWER COMMISSION

No. 611

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE, PETITIONER

v.

PENNSYLVANIA WATER AND POWER COMPANY AND PENNSYLVANIA PUBLIC UTILITY COMMISSION

No. 612

PUBLIC SERVICE COMMISSION OF MARYLAND, PETITIONER

v.

PENNSYLVANIA WATER AND POWER COMPANY AND PENNSYLVANIA PUBLIC UTILITY COMMISSION

MOTION OF THE FEDERAL POWER COMMISSION TO POSTPONE ARGUMENT IN NOS. 428 AND 429 FOR THREE WEEKS AND MEMORANDUM AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR CERTIORARI IN NOS. 611 AND 612

The Federal Power Commission moves that this Court postpone the argument in Nos. 428 and 429

three weeks from the week of March 31 to the week of April 21, so as to enable the Court to decide whether to grant certiorari in Nos. 611 and 612, and if certiorari is granted, to set the cases down for argument together during the week of April 21. The Government also submits that the petitions for certiorari in Nos. 611 and 612 should be granted.[1]

The conflict between the decision of the Court of Appeals for the District of Columbia in the cases presently before the Court (Nos. 428 and 429) with the decision of the District Court, now affirmed by the Fourth Circuit, in Nos. 611 and 612, was emphasized by Penn Water (Pet., No. 428, pp. 1, 3, 4, 9, 14, 15, 17; see also Pet., No. 429, pp. 29, 38) as a principal reason for granting certiorari in No. 428.[2] The Fourth Circuit's decision on affirmance was the first in the group of related cases which, by so stating explicitly, acknowledged that the two circuits were in disagreement. In addition, the issue upon which the two courts have disagreed is more likely to be reached in Nos. 611 and 612 than in Nos. 428 and 429. In

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[1] The Federal Power Commission is, of course, a party in Nos. 428 and 429. It unsuccessfully sought to intervene in the Fourth Circuit in Nos. 611 and 612, but was allowed to file a brief and argue orally. It is appearing in this Court in the latter cases as amicus curiae.

[2] Penn Water's petition also relied of course, upon the conflict which the earlier decision of the Fourth Circuit in *Penn Water and Power Company* v. *Consolidated Gas, E. L. & P. Co.*, 184 F. 2d 552, certiorari denied, 340 U. S. 906, 186 F. 2d 934, which preceded the decision in the District of Columbia Court of Appeals.

the order reducing rates in Nos. 428 and 429, the Federal Power Commission prescribed certain rate schedules to supersede the previous rate and charges and ordered that all "other provisions of the * * * contracts *in and of themselves lawful* prescribing or defining the * * * services to be furnished * * * shall be observed and be in force" (No. 428, R. XVII 62, italics supplied), thereby excluding provisions which as private contracts might be authoritatively determined to be in violation of the antitrust law. The order involved in Nos. 611 and 612 (which has been upheld by the Third Circuit in *Safe Harbor W. P. Corp.* v. *Federal Power Commission,* 179 F. 2d 179, certiorari denied, 339 U. S. 957) contains no such qualification, and thus clearly requires compliance with the contract on file with the Federal Power Commission, allegedly restrictive clauses and all, unless and until the Commission modifies its own order. These factors make the controversy in Nos. 611 and 612 a more appropriate vehicle than Nos. 428 and 429 for determination of the important issue upon which the two circuits have disagreed, *i.e.,* whether the Federal Power Commission may order a power company to carry out an arrangement which, as an agreement between the parties, would otherwise violate the Sherman Act. The denial of certiorari in the first *Penn Water* case (340 U. S. 906), in which the Federal Power Commission had only ordered compliance with arrangements "in and of themselves

lawful" and before the existence of the conflict with the District of Columbia Circuit would not, of course, justify a denial in Nos. 611 and 612 after the two Circuits had openly disagreed, and in a case in which the Commission had prescribed the arrangement found unlawful by the Fourth Circuit.

The desirability of hearing the cases together does not depend merely on the fact that they are in conflict. The companies and the State Commissions involved are the same. Penn Water and Consolidated each possess half of the voting rights in Safe Harbor, although Consolidated invested two-thirds of the capital and is entitled to two-thirds of the power. The contracts have been found by the Fourth Circuit to be indistinguishable both with respect to separability and anti-trust violation. And more importantly, Penn Water and the Pennsylvania Public Utility Commission, petitioners in Nos. 428 and 429, are insisting that the contracts are interdependent, that the Penn Water Contract "was linked to a companion contract (the Safe Harbor contract)." (Pet. No. 428, pp. 3, 14-15; Pet. No. 429, pp. 37-38). Both petitions urge that the Federal Power Commission "based the critical features of the orders * * * upon the assumed existence and continuance of the illegal Baltimore and *Safe Harbor* contracts." (Pet. No. 428, p. 3; Pet. No. 429, p. 37; italics supplied).[3] The petitions also argue that the existence of the interstate power pool "depends upon the illegal contracts * * *

and upon the illegal revenue pooling provisions thereof" (Pet. No. 428, p. 14; Pet. No. 429, pp. 37-38). It is also contended (Pet. No. 428, p. 15) that the allocation of the reduction in rates as between the Baltimore company and the Pennsylvania utility customers of Penn Water rested on the basis of the alleged " 'entitlements' of Consolidated under the Baltimore and Safe Harbor contracts" and that "without the illegal contracts such 'entitlements' would be nonexistent." It is thus clearly petitioners' position in Nos. 428 and 429 that the decision of the Fourth Circuit in Nos. 611 and 612 as to the validity of the contracts supersedes the orders of the Federal Power Commission and destroys a portion of the premises upon which those orders rest.

The alleged interrelationship [4] between the contracts and the Federal Power Commission orders with respect thereto makes it highly desirable that the cases be heard and decided together if this can be accomplished without undue delay. We are advised that counsel for Consolidated requested counsel for Penn Water to cooperate in Nos. 611 and 612 so as to enable all of the cases to be heard together this Term. This request, which seems

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[3] The Statements in both petitions repeatedly refer to the Safe Harbor contract as well as to the Penn Water contract (Pet. No. 428, pp. 3, 4, 6, 7, 9, 10; No. 429, pp. 12, 13).

[4] The statement herein of the contentions of the petitioners in No. 428 and 429 and respondents in Nos. 611 and 612 is not to be taken as an admission of the validity of those contentions, but merely as showing the questions which will necessarily be argued in the cases.

to us to have been entirely reasonable, was refused on the ground that the cases were not sufficiently related, a position which hardly seems consistent with Penn Water's petition for certiorari in No. 428 and its emphasis on the conflict between them. By not consenting to certiorari in the case which establishes the conflict upon which it relied, Penn Water will prevent this Court from passing on the petition until March 31, which would normally be too late for the case to be heard this Term if certiorari is granted.

The circumstances set forth above, however, in our opinion, would justify the Court in granting certiorari in Nos. 611 and 612 and in setting them down for argument during the week of April 21. What we believe to be the critical issues involved will have been briefed in Nos. 428 and 429. As to the others, we are advised that if this motion to postpone the argument of the latter cases for three weeks is granted (thus indicating a possibility that the cases might be heard together), Consolidated and the Maryland Commission will immediately commence the preparation of their briefs in Nos. 611 and 612, and drafts will be served on respondents in these cases far enough in advance of argument to enable respondents to have the two weeks allowed by the Rules to reply thereto.

The Government does not wish to delay final decision in the already prolonged litigation involved in Nos. 428 and 429, but postponing the argument for three weeks would not unduly delay

the ultimate determination. And the advantages of hearing Nos. 611 and 612 at the same time and thus speedily disposing of all aspects of an interrelated controversy lead to the conclusion that both the public interest and the orderly management of this Court's business would be better served if the cases could be heard together this Term, notwithstanding the opposition of Penn Water to that procedure.

Accordingly, it is respectfully submitted that this Court should (1) postpone the argument in Nos. 428 and 429 until the week of April 21, (2) grant certiorari in Nos. 611 and 612, and (3) order the latter cases argued during the week of April 21, immediately following Nos. 428 and 429.

PHILIP B. PERLMAN,
Solicitor General.

BRADFORD ROSS,
General Counsel,
Federal Power Commission.

I join in this motion to postpone the argument in Nos. 428 and 429.

CHARLES D. HARRIS,
General Counsel,
Public Service Commission of Maryland.

MARCH, 1952.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

Nos. 611 and 612

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE AND PUBLIC SERVICE COMMISSION OF MARYLAND, PETITIONERS

v.

PENNSYLVANIA WATER & POWER COMPANY AND PENNSYLVANIA PUBLIC UTILITY COMMISSION

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

The Government assumes that this Court will determine the appropriate disposition of this case after full consideration in the light of the briefs and oral argument in Nos. 428 and 429.[1] In our brief in those cases (pp. 94–105) we have stated our reasons for believing that the decision

[1] *Pennsylvania Water and Power Co.* v. *Federal Power Commission, Pennsylvania Public Utility Commission* v. *Federal Power Commission.*

of the Fourth Circuit in the instant case contravenes the doctrine of primary jurisdiction and the statutory scheme for review of orders of the Federal Power Commission.

The purpose of this memorandum is to correct a misstatement in Penn Water's brief in opposition in Nos. 611 and 612. In two places the brief declares that the Government's prior memorandum "concedes" that "the contract 'as an agreement between the parties, would otherwise violate the Sherman Act'" (pp. 7, 11). The quoted expression was the last clause in the sentence which reads in full (Government's Memorandum as Amicus Curiae in Support of Petitions for Certiorari in Nos. 611 and 612, p. 3):

> These factors make the controversy in Nos. 611 and 612 a more appropriate vehicle than Nos. 428 and 429 for determination of the important issue upon which the two circuits have disagreed, *i. e.*, whether the Federal Power Commission may order a power company to carry out an arrangement which, as an agreement between the parties, would otherwise violate the Sherman Act.

It is apparent that, restored to its context, the passage quoted by petitioner contains no concession or admission of any sort, but was merely descriptive of the issue as to which the two courts of appeals had disagreed, without characterizing the facts of the instant case as "otherwise" un-

lawful or not. See also footnote 4, page 5, of Government's prior memorandum.

Since the Commission's order, upheld by the Third Circuit, prescribed the contract as the rate schedule to be observed, the companies' conduct is governed now by the Commission's order, not by the contract as a private agreement. Any contention as to the illegality of the arrangement so prescribed by the Commission, for antitrust reasons or otherwise, must be raised in the first instance before the Commission. No such contention has been presented to the Commission for determination with respect to its Safe Harbor orders.

In fairness to the other parties, we have deemed it advisable to set the record straight.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

BRADFORD ROSS,
General Counsel, Federal Power Commission.

MARCH, 1952.

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